Donald E. MUIR, H. Jeff Buttram, and
O. Navarro Faircloth,
Plaintiffs-Appellants,

v.

ALABAMA EDUCATIONAL TELEVISION
COMMISSION: Jacob Walker,
etc., et al., Defendants-Appellees.

Gertrude BARNSTONE and Harvey
Malyn, Plaintiffs-Appellees,

v.

The UNIVERISTY OF HOUSTON,
KUHT-TV, et al.,
Defendants-Appellants.

Nos. 80-7546, 81-2011.

United States Court of Appeals,
Fifth Circuit.*

Oct. 15, 1982.

Before BROWN, CHARLES CLARK, RONEY,

GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE,

KRAVITCH, FRANK M. JOHNSON, GARZA**,

HENDERSON, REAVLEY, POLITZ, HATCHETT,

*Former Fifth Circuit case, Section 9(1)
of Public Law 96-452 -- October 14, 1980.

**Judge Garza participated in the hearing
but took senior status on July 7, 1982
and is no longer qualified to participate
in the en banc decision.
Judges Jolly and Higginbotham joined the
(cont'd on following page)

ANDERSON, RANDALL, TATE, SAME D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges.***

JAMES C. HILL, Circuit Judge:

I. Introduction

The two appeals before this Court on consolidated rehearing raise the important and novel question of whether individual viewers of public television stations, licensed by the Federal Communications Commission to state instrumentalities, have a First Amendment right to compel the licensees to broadcast a previously scheduled program which the licensees have decided to cancel. For the reasons stated below we find that the viewers do not have such a right.

(cont'd from preceding page)
Court after submission and oral argument but do not choose to participate.

***John C. Godbold, Chief Judge, did not participate in the consideration or decision of this case.

Both cases before us concern the decisions of the licensees not to broadcast the program "Death of a Princess." In Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (N.D. Ala. 1980), the District Court for the Northern District of Alabama denied the plaintiff viewers' motion for a preliminary injunction requiring the defendant licensee, Alabama Educational Television Commission (AETC), to broadcast the program. The district court found: (1) that the likelihood of success on the merits criterion for an injunction had not been shown; (2) that the First Amendment protects the right of broadcasters, private and public, to make programming decisions free of interference; and (3) that viewers have no First Amendment right of access to the Alabama educational television network sufficient to compel the showing of "Death of a Princess." The court granted

summary judgment for AETC.

In Barnstone v. University of Houston, 514 F. Supp. 670 (S.D. Tex. 1980), the District Court for the Southern District of Texas reached a different conclusion and granted the injunction requested by the plaintiff viewers and ordered the defendant licensee, University of Houston, to broadcast the program. The court held that KUHT-TV, the television station operated by the university, was a public forum and as such it could not deny access to speakers--here, the producers of "Death of a Princess"--who wished to be heard in the public forum, unless its reasons for doing so could withstand the rigorous scrutiny to which "prior restraints" are traditionally subjected.

On appeal a panel of this court affirmed the District Court's decision

in Muir.[1] The panel held that the plaintiffs had no constitutional right to compel the broadcast of "Death of a Princess," and that AETC's refusal to broadcast the program was a legitimate exercise of its statutory authority as a broadcast licensee and was protected by the First Amendment. In Barnstone another panel of this court found that the decision in Muir required that the panel reverse the judgment of the District Court for the Southern District of Texas and dissolve the injunctive relief which had been granted the plaintiffs.[2]

We directed that both cases be consolidated and reheard en banc. We now affirm the judgment of the District

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1. Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (5th Cir. 1981).

2. Barnstone v. University of Houston, 660 F.2d 137 (5th Cir. 1981).

Court for the Northern District of Alabama in Muir and reverse the judgment of the District Court for the Southern District of Texas in Barnstone.

II. Factual Background

The Muir case arose when AETC decided not to broadcast "Death of a Princess," which had been scheduled for broadcast on May 12, 1980 at 8:00 P.M. The program, one of thirteen in the series "World," is a dramatization of the investigation by the program's director, producer and co-author into the motivations and circumstances which were said to have led to the July 1977 execution for adultery of a Saudi Arabian princess and her commoner lover.[3]

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3. "Death of a Princess" was produced jointly by WGBH Educational Foundation, licensee of public television station WGBH-TV in Boston, Massachusetts, and ATV Network of London, England.

AETC, organized under Ala. Code § 16-7-1, is responsible for "making the benefits of educational television available to and promoting its use by inhabitants of Alabama" and has "the duty of controlling and supervising the use of channels reserved by the Federal Communications Commission to Alabama for non-commercial, educational use." Ala.Code § 16-7-5. AETC operates a statewide network of nine noncommercial, educational television stations licensed by the Federal Communications Commission under the Communications Act of 1934 (47 U.S.C. §§ 151, et seq.). AETC is funded through state legislative appropriations from the Special Education Trust Fund, matching federal grants through the Corporation for Public Broadcasting (CPB), and private contributions.

AETC is a member of the Public Broadcasting Service (PBS), a non-profit corporation distributing public, non-commercial television programs to its members by satellite. AETC is also a member of the Station Program Cooperative (SPC), a program funding and acquisition mechanism operated by PBS. Membership in SPC entitles licensees to participate in the selection and funding of national public television programs distributed by PBS. Only those licensees who contribute to a program's cost have a right to broadcast or not to broadcast the program.[4]

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4. PBS's "Station Users Agreement" reposing in licensees the absolute right to select programs they will broadcast and to determine when they will broadcast them accords with the FCC regulation contained in 47 C.F.R. § 73.658(e) which requires that every broadcaster reserve the right to reject any program offered to it. The FCC requires that (footnote continued on following page)

PBS's acquisition of the program series "World" was funded by 144 public television licensees, including AETC, through the SPC. During the week prior to the scheduled broadcast of "Death of a Princess" AETC received numerous communications from Alabama residents protesting the showing of the program. The protests expressed fear for the personal safety and well-being of Alabama citizens working in the Middle East if the program was shown. On May 10 AETC announced its decision not to broadcast the film as scheduled.

Appellants, Muir, Buttram and Faircloth, residents of Alabama who had planned to watch "Death of a Princess," brought this action on May 12, 1980

(footnote continued from preceding page) every broadcaster consistently maintain independent control over selection of programs as a condition to retention of a license. Cosmopolitan Broadcasting, 59 F.C.C.2d 558 (1976). See p. 1040 infra.

under the First and Fourteenth Amendments and 42 U.S.C. § 1983, seeking to compel AETC to broadcast the film, and preliminary and permanent injunctions against AETC's making "political" decisions on programming.

The Barnstone case arose in a factual context similar to that of Muir. The University of Houston is a co-educational institution of higher learning funded and operated by the State of Texas. See Tex. Educ. Code Ann. §§ 111.01 et seq. The university funds and operates KUHT-TV, a public television station licensed to the university by the F.C.C. As a member of the SPC, KUHT-TV contributed to the funding of the "World" program series. KUHT-TV scheduled "Death of a Princess" for broadcast on May 12, 1980 at 8:00 P.M.

On May 1, 1980 KUHT-TV announced that it had decided not to broadcast

the program. This decision was made by Dr. Patrick J. Nicholson, University of Houston Vice-President for Public Information and University Relations. Dr. Nicholson had never previously made a programming decision such as this, though as the university official charged with the responsibility of operating KUHT-TV he had the power to do so. In a press release announcing the cancellation Dr. Nicholson gave the basis of his decision as "strong and understandable objections by the government of Saudi Arabia at a time when the mounting crisis in the Middle East, our long friendship with the Saudi government and U.S. national interests all point to the need to avoid exacerbating the situation." Dr. Nicholson also expressed a belief that the program was not balanced in a "re-

sponsible manner."[5]

Upon learning of Dr. Nicholson's decision, on May 8, 1980, plaintiff Barnstone brought suit to require KUHT-TV to air "Death of a Princess."[6] Ms.

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5. In addition to the reasons cited in the press release, the District Court, upon consideration of Dr. Nicholson's testimony, found four other reasons why the cancellation decision may have been made. First, Dr. Nicholson testified that he considered the program to be "in bad taste." Second, Dr. Nicholson expressed concern that some members of the public might believe that the "docu-drama" was a true documentary. Third, Dr. Nicholson testified that the University of Houston had previously entered into a contract with the Saudi Arabian royal family to instruct a particular princess. Finally, Dr. Nicholson testified that he had been in charge of fund raising activities for the university from 1957-1978 and that a significant percentage of the university's private contributions came from major oil companies and from individuals in oil related companies.

6. Harvey Malyn was subsequently granted leave to join this action as a party-plaintiff.

Barnstone argued that as a subscriber to and regular viewer of KUHT-TV her First and Fourteenth Amendment rights were violated by the decision to cancel the program.

III. The First Amendment Does Not Prohibit Governmental Expression

The central argument advanced by the plaintiffs on appeal is that their First Amendment rights were violated when the defendants, as state actors, denied the plaintiffs an opportunity to view "Death of a Princess" on the public television stations operated by the defendants. We are thus called upon to determine whether the First Amendment rights of viewers impose limits on the programming discretion of public television stations licensed to state instrumentalities.

[1-3] The First Amendment operates to protect private expression from in-

fringement by government. Such protection applies both to the right to speak and the right to hear and its operative in a variety of contexts.[7] The amendment prohibits government from controlling or penalizing expression which has been singled out by government because of the expression's viewpoint.[8] The First Amendment also prohibits government from taking certain actions which impermissibly constrict the flow of information or ideas.[9]

[4] The plaintiffs emphasize that the protection of the First Amendment extends only to private expression and

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7. See L. Tribe, American Constitutional Law, 580-584 (1978).

8. See, Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-2290, 33 L.Ed.2d 212 (1972); New York Times Co. v. Sullivan, 376 U.S. 254, 269-270, 84 S.Ct. 710, 720-721, 11 L.Ed.2d 686 (1964).

9. See Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

not to governmental expression. They assert that the amendment serves only to confer duties on government--not rights.[10] While this argument of the plaintiffs may be essentially correct it in no way resolves the issue before us. To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government. Even without First Amendment protection government may "participate in the marketplace of ideas," and "contribute its own views to those of

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10. Plaintiffs invoke Justice Stewart's holding in Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94, 139, 93 S.Ct. 2080, 2104, 36 L.Ed.2d 772 (1973)(Stewart, J., concurring) that "[t]he First Amendment protects the press from governmental interference, it confers no analogous protection on the Government."

other speakers." Community Service Broadcasting v. F.C.C., 593 F.2d 1102, 1110 n.17 (D.C. Cir. 1978).[11] As Justice Stewart aptly noted in Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94, 139, n.7, 93 S.Ct. 2080, 2105, n. 7, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) (hereinafter CBS), "[g]overnment is not restrained by the First Amendment from controlling its own expression ... '[t]he purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.'"[12]

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11. See L. Tribe American Constitutional Law, 588-590 (1978); P.A.M. News Corp. v. Butz, 514 F.2d 272 (D.C. Cir. 1975).

12. Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be
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Our essential task thus does not center on determining whether AETC and the University of Houston are vested with a First Amendment right to make the programming decisions which they made regarding "Death of a Princess." In the absence of a violation of a constitutional right inhering in the plaintiffs, AETC and the University of Houston are free to make whatever programming decisions they choose, consistent with statutory and regulatory requirements. The fundamental question before us is whether in making the programming decisions at issue here, the defendants violated the First Amendment rights of the plaintiffs.

(footnote continued from preceding page) applied to private expression. Yet there is nothing to suggest that, absent such limitation, government is restrained from speaking any more than are the citizens. Freedom of expression is the norm in our society, for government (if not restrained) and for the people. Freedom of speech is not good government because it is in the First Amendment; it is in the First Amendment because it is good government.

IV. The Regulatory Framework Enacted by Congress

Our inquiry into the constitutional issue at hand is aided by a brief review of the broadcast legislation enacted by Congress.[13] Such a review reveals an

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13. The Supreme Court in CBS observed that First Amendment issues regarding broadcast licensees should be analyzed in light of the Congressional established statutory and regulatory scheme:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For during that time Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned."

412 U.S. at 102, 93 S.Ct. at 2086. The Court went on to point out:

> That is not to say we 'defer' to the judgment of the Congress and the Commission on a constitutional question, or that we

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attempt by Congress to establish a regulatory system that accommodates the First Amendment interests of the public and of the private broadcast licensees and, it appears, the interests of government broadcast licensees unless otherwise limited by proper legislation.[14]

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> would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.

Id. at 103, 93 S.Ct. at 2086.

14. Extensive discussion of the history of broadcast regulation is found in CBS at 103-104, 93 S.Ct. at 2086-2087; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-386, 89 S.Ct. 1794, 1798-1804, 23 L.Ed.2d 371 (1968); National Broadcasting Co. v. United States, 319 U.S. 190, 210-17, 63 S.Ct. 997, 1006-09, 87 L.Ed. 1344 (1943).

Prior to 1927 the allocation of broadcast frequencies was left entirely to the private sector and the result was "chaos." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375, 89 S.Ct. 1794, 1798, 23 L.Ed.2d 371 (1968)(hereinafter Red Lion). It quickly became apparent that governmental regulation of the electromagnetic spectrum was essential if the spectrum was to be optimally utilized. "Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard." Red Lion, 395 U.S. at 376, 89 S.Ct. at 1799. Congress was confronted with a fundamental choice between total governmental ownership and control of the broadcast media--the choice of most other countries--or some other alternative. The decision of Congress to establish a system of broadcast licensing rather than

government monopolization reflects "a desire to maintain for licensees so far as consistent with necessary regulation a traditional journliastic role." CBS, 412 U.S. at 116, 93 S.Ct. at 2093 (Burger, C.J., writing for three members of the court). Congress was, however, cognizant of the fact that the Nation's airwaves are a public resource not subject to private ownership. Thus, in enacting a regulatory scheme for the broadcast media, Congress was sensitive to the need to protect the rights of the public. The Court in Red Lion aptly noted that because of the scarcity of radio frequencies Congress is permitted to legislate a licensing regime which limits the number of people allowed to broadcast, but that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and

purposes of the First Amendment." Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806. The Court went on to observe that the purpose of the First Amendment in the context of broadcasting is "to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Id. at 390, 89 S.Ct. at 1806.

Congress thus enacted the Radio Act of 1927 which established the Federal Radio Commission to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[15] The Radio Act of 1927 was not only protective of the First Amendment interests of the public but it also recognized and sought

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15. Radio Act of 1927 § 4, 44 Stat. 1163.

to protect the First Amendment interests of broadcast licensees. The Court in CBS, 412 U.S. at 105, 93 S.Ct. at 2087, observed that in enacting this legislation "Congress chose to leave broad journalistic discretion with the licensees." The Court noted further that "Congress specifically dealt with and firmly rejected the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." Id.

The Communications Act of 1934, 47 U.S.C. §§ 151 et seq., the successor to the Radio Act of 1927, was similarly designed by Congress to promote a balance between the First Amendment interests of the public and of the broadcast licensees. In furtherance of the First Amendment rights of the public the Communications Act specifically mandates that the Fed-

eral Communications Commission consider the public interest in the course of granting licenses, 47 U.S.C. §§ 307(a), 309(a); renewing them, 47 U.S.C. § 307; and modifying them.[16] The FCC is also required to consider the public interest in promulgating rules and regulations governing the use of broadcast licenses. 47 U.S.C. § 303.

In affirming the First Amendment interests of broadcast licensees § 3(h) of the Communications Act specifically provides that broadcast licensees are not to be deemed common carriers.[17] The

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16. The "public interest" includes the First Amendment interest of the public to receive "suitable access to social, political, esthetic, moral, and other ideas and experiences ... " Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806.

17. Section 3(h) provides as follows:
'Common carrier,' or 'carrier' means any person engaged as a common carrier for hire in interstate or foreign communication by wire or radio or in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where ref-

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Court in CBS observed that this along with other provisions "evince a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." CBS, 412 U.S. at 109, 93 S.Ct. at 2089.[18]

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erence is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such a person is so engaged, be deemed a common carrier.
47 U.S.C. § 153(h).

18. See also FCC v. Midwest Video Corp., 440 U.S. 689, 705, 99 S.Ct. 1435, 1443, 59 L.Ed.2d 692 (1979).
"As we see it § 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems. The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any
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The FCC has, consequently fulfilled its statutory obligations by promulgating regulations which view licensees as having the sole right and nondelegable responsibility to select the programs to be broadcast.[19] The Court in

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benefits associated with the resulting public access. It is difficult to deny, then, that forcing broadcasters to develop a "nondiscriminatory system for controlling access ... is precisely what Congress intended to avoid through § 3(h) of the Act."

19. The most salient example is section 73.658(e) of the Commission's rules which provides:

> No license shall be granted to a television broadcast station having any contract, agreement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest or (2) substituting a program which, in the station's opinion is of greater local or national importance.

47 C.F.R. § 73.658(e).

Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917, 921 (D.C. Cir. 1978), pointed out that:

> A basic premise of Commission policy is that a licensee is a 'trustee' for the public and that he must therefore assume the 'primary duty and privilege to select the material to be broadcast to his audence ... ' [cites omitted] 'The Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee.' [cites omitted]

Public television licensees are generally subjected to the same regulatory requirements as their commercial counterparts. See Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 291 (D.C. Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976). Thus the FCC, in its demand for unfettered licensee control over programming has made no distinction between private and public licensees. City of New York

Municipal Broadcasting System, 56 F.C.C. 2d 169 (1975).

The Public Broadcasting Act of 1967[20] enacted by Congress to provide financial assistance for programming and the operations of public broadcasters further illustrates a Congressional desire that public broadcast licensees retain independent programming responsibility. In enacting this statute Congress expressed the belief that the "local stations are the bedrock" and they rather than anyone else, are to "retain the responsibility to assess community needs and determine what programs will best meet those needs." S.Rep. No. 222, 90th Cong., 1st Sess. 7 (1967), U.S. Code Cong. & Admin. News 1967, p. 1772, 1778. Congress noted that "the decision to broadcast ... [any] program remains with the local station,"

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20. Public Broadcasting Act of Nov. 7, 1967, Pub. L. No. 90-129, 81 Stat. 365.

id. at 15, U.S. Code Cong. & Admin. News 1967, p. 1786, and "each station would be required to make its own decision as to what programs it accepts and broadcasts and at what time." Id. at 14-15,[21] U.S. Code Cong. & Admin. News 1967, p. 1786.

[5, 6] The picture which emerges from the regulatory scheme adopted by Congress is one which clearly shows broadcast licensees endowed with the privilege and responsibility of exercising free programming control of their broadcasts, yet also charged with the obligation of making programming decisions which protect the legitimate interests of the public. The right to the free exercise of programming discretion is, for private licensees, not only statutorily conferred

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21. This insistence on unhindered local licensee programming discretion was codified in Section 396(g)(1)(B) of the Act.

but also constitutionally protected. CBS. Under the existing statutes public licensees such as AETC and the University of Houston possess the same rights and obligations to make free programming decisions as their private counterparts; however, as state instrumentalities, these public licensees are without the protection of the First Amendment. This lack of constitutional protection implies only that government could possibly impose restrictions on these licensees which it could not impose on private licensees. The lack of First Amendment protection does not result in the lessening of any of the statutory rights and duties held by the public licensees. It also does not result in individual viewers gaining any greater right to influence the programming discretion of the public licensees.

V. KUHT-TV and AETC are not Public Forums

It is clear that Congress did not deem it necessary for viewers to be accorded a right of access to television broadcast stations in order for the public's First Amendment interests in this medium to be fully realized. Indeed it is clear that Congress concluded that the First Amendment rights of public television viewers are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest. In spite of this Congressional scheme the District Court in Barnstone found that KUHT-TV was a public forum because it was operated by the government for public communication of views on issues of political and social significance. The court held that as a public forum the station could not deny access

to speakers who wished to be heard in the forum, unless the requirements for prior restraint were satisfied. 514 F.Supp. at 689-91.

The plaintiffs now urge that we affirm the District Court's ruling that public television stations are public forums. The plaintiffs, unlike the District Court, however, do not argue for a public right of access to the stations. Instead the plaintiffs contend that as public forums the stations are prohibited by the First Amendment from making programming decisions motivated by hostility to the communicative impact of a program's message and stemming from a specific viewpoint of the broadcaster.

[7, 8] We find both the holding of the District Court and the argument of the plaintiffs to be incorrect. The Supreme Court has recently rejected the theory adopted by the District Court

that because a government facility is "specifically used for the communication of information and ideas" it is ipso facto a public forum. United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 101 S.Ct. 2676, 2685 n. 6, 69 L.Ed.2d 517 (1981).[22] A facility is a public forum only if it is designed to provide a general public right of access to its use, or if such public access has historically existed and is not incompatible with the facility's primary activity.[23] In Southeastern

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22. The Court in United States Postal Service ruled that mailboxes are not public forums.

23. Cf. Greer v. Spock, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976): "The Court of Appeals was mistaken ... in thinking ... that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment. Such a principle of constitutional law has never existed, (footnote continued on following page)

Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972), we adopted the following test for determining whether a public facility is a "public forum":

> does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance.

457 F.2d at 1019.

In the cases in which a public facility has been deemed a public forum the speakers have been found to have a right of access because they were attempting to use the facility in a manner fully consistent with the "pattern of usual

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(footnote continued from preceding page) and does not exist now. The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" (quoting Adderley v. Florida, 385 U.S. 39, 48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966).

activity" and "the general invitation extended."[24] The pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority. The general invitation extended to the public is not to schedule programs, but to watch or decline

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24. The nature of facilities held to constitute public forums may be gleaned from the cases: municipal auditoriums, Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed. 2d 448 (1975); bus terminals, Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), cert. denied, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968); airports, Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975), cert. denied, 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975); high school auditoriums, National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (en banc); public libraries, Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966)(plurality opinion); shopping centers, Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968); and welfare offices, Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 (2d Cir. 1974).

to watch what is offered.[25] It is thus clear that the public television stations involved in the cases before us are not public forums. The plaintiffs have no right of access to compel the broadcast of any particular program.

Our holding today is consistent with the Supreme Court's ruling in CBS that television stations operated by private broadcast licensees provide no public right of access. The Court in CBS pointed out that the creation of a public right of access to television stations

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25. Similarly producers of television programs are extended no invitation to air their programs on the public television stations. Producers are, of course, free to submit their programs to the stations with a request that they be broadcast, but they have no right to compel such broadcast. The decision whether to broadcast a program remains entirely with the licensee. The District Court for the Southern District of Texas thus erred in finding that the producers of "Death of a Princess" had a right of access to station KUHT-TV to broadcast the film.

would result in the derogation of the licensees' duty to insure that their stations serve the public interest:

> The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. The public interest would no longer be "paramount" but, rather, subordinate to private whim.

CBS, 412 U.S. at 124, 93 S.Ct. at 2097. The court further observed that, aside from being inconsistent with the licensees' obligation to insure that the public interest is served, a public right of access is also inconsistent with the licensees' essential task of exercising editorial discretion:

> Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits or his or her views. All journalistic tradition and experience is to the contrary.

Id.

The plaintiffs stress that they do not argue for the creation of a public right of access to public television stations. They contend that, even without a public right of access, the stations are public forums and as such cannot make programming decisions based on the communicative impact of a program. We find this contention to be untenable. It is the right of public access which is the essential characteristic of a public forum and the basis which allows a speaker to challenge the state's regulation of the forum. The gravamen of a speaker's public forum complaint is the invalid and discriminatory denial of his right of access to the forum. If a speaker does not have a right of access to a facility, that facility by definition is not a "public forum" and the speaker is without grounds for challenge under the public

forum doctrine.[26]

VI. The Decision to Cancel Death of a Princess was not Governmental Censorship

The plaintiffs argue that even if we decline to characterize KUHT-TV and AETC as public forums we should nonetheless find that the defendants violated the plaintiffs' First Amendment rights by "censoring" "Death of a Princess." The plaintiffs contend that censorship, in violation of the First Amendment, occurs when state officials in charge of state operated public television stations decide to cancel a scheduled program because of the officials' opposition to the program's political content.

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26. See Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); Lehman v. Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

[9] There is no question that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content .... The essence of this forbidden censorship is content control." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-2290, 33 L.Ed.2d 212 (1972). However, the First Amendment prohibitions applicable to one method of expression do not always transfer intact to another method because "[e]ach method tends to present its own peculiar problems." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952). The Supreme Court has thus recognized that "because the broadcast media utilize a valuable and limited public resource" they "pose unique and special problems not present in the traditional free speech case." CBS,

412 U.S. at 101, 93 S.Ct. at 2085.

[10, 11] We are not convinced that editorial decisions of public television stations owned and operated by the state must, or should, be viewed in the same manner and subjected to the same restrictions as state regulatory activity affecting speech in other areas. Standard First Amendment doctrine condemns content control by governmental bodies where the government sponsors and financially supports certain facilities through the use of which others are allowed to communicate and to exercise their own right of expression.[27] Government is allowed to impose restrictions only as to "time,

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27. See Bazaar v. Fortune, 476 F.2d 570, 574, aff'd as modified en banc, 489 F.2d 225 (5th Cir. 1973), cert. denied, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974)(university literary magazine); Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969)(speaker invited by college student organization).

place, or manner" in the use of such public access facilities--public forums.[28] As we observed earlier, however, the First Amendment does not prohibit the government, itself, from speaking, nor require the government to speak.[29] Similarly, the First Amendment does not preclude the government from exercising editorial control over its own medium of expression. See Wooley v. Maynard, 430 U.S. 705, 716-17, 97 S.Ct. 1428, 1436-37, 51 L.Ed.2d 752 (1977); Advocates for the Arts v. Thompson, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976); Avins v. Rutgers, State University of New Jersey, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920, 88 S.Ct. 855, 19 L.Ed.2d 982 (1968); Network Project

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28. See L. Tribe 580-584.

29. See p. 1050 infra; see also Houchins v. KQED, Inc. 438 U.S. 1, 13-14, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553 (1978).

v. Corporation for Public Broadcasting, 4 Med.L.Rptr. 2399, 2409 (D.D.C. 1979).

[12] The plaintiffs concede that state officials operating public television stations can exercise some editorial discretion. They contend, however, that in exercising this discretion the officials must be "carefully neutral as to which speakers or viewpoints are to prevail in the marketplace of ideas." CBS, Inc. v. FCC, 629 F.2d 1, 30 (D.C. Cir. 1980), aff'd 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d 706 (1981). The plaintiffs further contend that if the officials restrict a program due to their hostility to the political content of the program then the restriction is presumptively unconstitutional. The plaintiffs suggest that we adopt the evidentiary standard established by the Supreme Court in Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d

471 (1977). Under this standard the initial burden would be on the plaintiffs to show that unconstitutional motivations were a "substantial" or "motivating" factor in the defendants' decisions to cancel "Death of a Princess." Once this burden is met by the plaintiffs the duty shifts to the defendants to show that the decisions would have been the same if the improper factor had not been considered.

The plaintiffs' analysis fails to recognize a number of essential differences between typical state regulation of private expressive activity and the exercise of editorial discretion by state officials responsible for the operation of public television stations. When state officials operate a public television station they must necessarily make discriminating choices. As the Supreme Court pointed out in CBS, 412 U.S. at

124, 93 S.Ct. at 2097, "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." In exercising their editorial discretion state officials will unavoidably make programming decisions which can be characterized as "politically motivated." All television broadcast licensees are required, under the public interest standard, to cover political events and to provide news and public affairs programs dealing with the political, social, economic and other issues which concern their community. See, Representative Patsy Mink (WHAR), 59 F.C.C.2d 987 (1976); Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26371 (July 18, 1974); Report and Statement of Policy re Commission En Banc Programming Inquiry, 44 F.C.C. 2303 (1960). The licensees are thus required to make the inherently subjective deter-

mination that their programming decisions are responsive to the needs, problems and interests of the residents of the area they serve. Red Lion, 395 U.S. at 380, 89 S.Ct. at 1801. A general proscription against political programming decisions would clearly be contrary to the licensees' statutory obligations, and would render virtually every programming decision subject to judicial challenge.

The plaintiffs seek to draw a distinction between a decision not to show a program and a decision to cancel a previously scheduled program. They suggest that while it is a proper exercise of editorial discretion for a licensee initially to decide not to schedule a program, it is constitutionally improper for the licensee to decide to cancel a scheduled program because of its political content. In support of their view the plaintiffs cited decisions holding

that school officials may be free initially to decide which books to place in their school libraries but that a decision to remove any particular book may be subject to constitutional challenge.[30] We are not persuaded, however,

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30. At the time this case was submitted to us, the plaintiff cited, inter alia, Pico v. Board of Educ., 638 F.2d 404 (2d Cir. 1980), and we noted that the Supreme Court had granted certiorari. On June 15, 1982, the judgment of the Supreme Court was handed down, Board of Educ. v. Pico, ____ U.S. ____, 102 S.Ct. 73 L.Ed.2d 435 (1982). We are unable to interpret the Court's opinion in Pico to give us guidance in the application of the First Amendment to the case at hand. First, Pico is a case involving a constitutional attack upon the removal of books from a school library which, as discussed in the text, is quite different from the situation confronting us. Further, we conclude that the Supreme Court decided neither the extent nor, indeed, the existence vel non., of First Amendment implications in a school book removal case.
A majority of the justices did not join any single opinion in Pico. There is a plurality opinion, i.e., one attracted more concurrences than did any other opinion leading to the result. The opinion by Justice Brennan is joined by
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(footnote continued from preceding page) Justice Marshall and Justice Stevens. Justice Blackmun concurred in all save one section, but dissents from the plurality's opinion that the "right to receive information" detected by Justice Blackmun imposes a duty upon the State to provide information or ideas, ____ U.S. at ____, 102 S.Ct. at 2814, and is dubitante as to the plurality's opinion that there is a difference between the removal of a book from a school library and the failure to acquire a book. Id. n.1.

The Chief Justice and three others, Justice Powell, Justice Rehnquist and Justice O'Connor, in dissent, agree with Justice Blackmun that there is no First Amendment obligation upon the State to provide continuing access to particular books. ____ U.S. at ____, 102 S.Ct. at 2819 (Burger, C.J., dissenting), thus making a majority of Members for that view. The four in dissent find no difference, in constitutional law, in the removal of a book and in the failure to acquire it. Id. ____ U.S. at ____, 102 S.Ct. at 2821. Three Members detect such a difference; four reject the notion; and one Member doubts its existence.

The Fifth Member of the Court voting for the judgment expresses no opinion on the First Amendment issues, being of the opinion that the Court should not, until after remand, "issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library." Id. ____ U.S. at ____, 102 S.Ct. at 2816 (White, J., concurring in the judgment). Justice White does not express the view that there may be facts implicating the First Amendment but, detecting that there

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(footnote continued from preceding page) may be a factual setting which would not involve constitutional concerns on the part of any Member, prefers a more complete record development before addressing such concerns.
Being instructed by Marks v. United States, 430 U.S. 188, 192-93, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)(plurality opinion), that in no clear-majority cases we should look to "that position taken by those members who concurred in the judgment on the narrowest grounds," id. at 169 n.15, 96 S.Ct. at 2923 n.15, and finding in the opinion of Justice White the narrowest grounds for the judgment, we conclude that Pico is of no precedential value as to the application of the First Amendment to these issues. (For commentary discussing the task of determining precedent from plurality opinions, see, e.g., Note, Plurality Decisions and Judicial Decisionmaking, 94 Harv.L.Rev. 1127 (1981); Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Colum.L.Rev. 756 (1980).
While the majority of the Court entered judgment in Pico resulting in a remand for the development of the record, this was necessarily based upon the status of the record and the issues presented in the case. Here, we are satisfied that the record before us adequately presents the issues.

that the distinction urged upon us is valid or that the school library cases are applicable.

The decision to cancel a scheduled program is no less editorial in nature than an initial decision to schedule the program. See Advocates for Arts v. Thomson, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976). Both decisions require the licensee to determine what will best serve the public interest, and, as we noted earlier, such a determination is inherently subjective and involves judgments which could be termed "political."

School libraries are distinguishable from broadcast stations in a number of important ways. There are limited hours in a day for broadcasting, and broadcast licensees are constantly required to make sensitive choices between

available programs. Cf. Board of Education v. Pico, ____ U.S. ____, ____, n.1, 102 S.Ct. 2799, 2814, n. 1, 73 L.Ed.2d 435 (1982)("The school's finite resources--as well as the limited number of hours in the day--require that educational officials make sensitive choices between subjects to be offered ....")(Blackmun, J., concurring in part). The maintenance of one volume on a library shelf does not (absent space limitations) preempt another. In broadcast, only one transmission of information, entertainment, or other message can occur at any one time. A library constantly and simultaneously proffers a myriad of written materials. As discussed in Part IV, hereinabove, the Congress has undertaken its careful analysis and balancing of conflicting interests involved in broadcasting and in public broadcasting, and the judicial

branch should pay careful attention.[31] CBS, 412 U.S. at 103, 93 S.Ct. at 2086. There have been no comparable deliberations or enactments by that branch with respect to libraries. More specifically, there is no counterprart, vis-a-vis libraries, to the Federal Communications

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31. All branches of government are, and ought to be, guardians of the Constitution. It is no encroachment upon the private preserve of the Judicial Branch for the Congress to undertake implementation of the First Amendment; it is the duty of the Congress to do so. The Judiciary must be the final arbiter, but it is not the sole provider of freedom under the Bill of Rights.
The courts properly pay close attention to the implementation of constitutional guarantees by the Congress. CBS, 412 U.S. at 103, 93 S.Ct. at 2086. Indeed, the Supreme Court has not infrequently deplored the absence of action by the Congress, which, by its nature, is equippped to gather information and consider the impact and effectiveness of proposals to implement such guarantees far more broadly than the considerations advanced in a given case. See, e.g., Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 421, 91 S.Ct. 1999, 2017, 29 L.Ed.2d 619
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Commission's "Fairness Doctrine."[32] When a television broadcaster finds that it has scheduled a program espousing one view, it may have unwittingly encumbered its limited broadcast hours with a requirement that equal time be devoted to other viewpoints which might touch upon an issue of limited interest in its viewing area. But the maintenance of one volume

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(footnote continued from preceding page) (Burger, C. J., dissenting)(absence of Congressional action to implement Fourth Amendment deplored); Stone v. Powell, 428 U.S. 465, 500, 96 S.Ct. 3037, 3055, 49 L.Ed.2d 1067 (Burger, C.J., concurring) (desirability of Congressional implementation of Fourth Amendment again noted).

32. "Formulated under the Commission's power to issue regulations consistent with the 'public interest,' the [Fairness Doctrine] imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. In fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid
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espousing one side of an issue does not invoke government regulation requiring that shelf space be made available for all other views. Finally, a school would be expected to furnish only one library for its student population. The residents of a state may expect a choice of a number of television stations, often with the publicly owned facility attracting the smallest number of viewers.

The right to cancel a program is, futhermore, far more integral a part of the operation of a television station than the decision to remove a book from a school library. Libraries typically have at least the opportunity to review a book before acquiring it, therefore, there may

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sponsor is unavailable and must initiate programming on public issues if no one else seeks to do so."
CBS, 412 U.S. at 110-11, 93 S.Ct. at 2090-91 (citations omitted).

be "few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity." Pico v. Board of Education, 638 F.2d 404, 436 (2d Cir. 1980)(Newman, J., concurring), aff'd, ____ U.S. ____, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). In comparison, television stations frequently do not have the chance to see a program until after the station's schedule has been printed, and there are numerous legitimate reasons why a station may decide to cancel a program it has initially scheduled. Indeed FCC regulations specifically require that licensees retain the power to reject any program which the licensee has already contracted for if the licensee determines that the program is "unsatisfactory or unsuitable or contrary to the public interest." 47 CFR § 73.658.

We conclude that the defendants'

editorial decisions to cancel "Death of a Princess" cannot be properly characterized as "censorship." Had the states of Alabama and Texas sought to prohibit the exhibition of the film by another party then indeed a question of censhorship would have arisen. Such is not the case before us. The states have not sought to forbid or curtail the right of any person to show or view the film. In fact plaintiff Barnstone has already viewed the film at an exhibition at Rice University in Houston.[33] The state officials in charge

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33. Thus, contary to the finding of the District Court in Barnstone, the defendant did not suppress the speech of the producer of "Death of a Princess." The defendants did not in any manner seek to prevent the producers from freely distributing or exhibiting the film. The defendants chose only not to exhibit the film through the stations which they were licensed to operate.

of AETC and KUHT-TV have simply exercised their statutorily mandated discretion and decided not to show a particular program at a particular time. There is a clear distinction between a state's exercise of editorial discretion over its own expression, and a state's prohibition or suppression of the speech of another.[34]

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34. The state may not suppress the expression of ideas. Thus, the state may not prevent Nazi's from expressing their views in a parade. National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam). There is a right to receive ideas that others express. Therefore, we apprehend that the state could not forbid or unreasonably obstruct, people within its jurisdiction from viewing the Nazi parade. Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed. 2d 398 (1965). Nevertheless, the State is free to decline to express itself in such a parade and we apprehend that, should a misguided police chief schedule the appearance of the police force at the head of a Nazi parade, wearing swastika arm bands, there would be no censorship, interference with the right to receive, or other First Amendment violation should the Mayor or City Council cancel the scheduled appearance of the police officers.

VII. The Plaintiffs Can Seek Remedial Relief from the FCC

Our holding that the defendants did not violate the plaintiffs' First Amendment rights does not preclude the plaintiffs from challenging the propriety of the defendants' programming decisions with the FCC. Our decision is limited to the constitutional issue presented. We offer no opinion as to whether or not the actions of AETC and the University of Houston comport with their statutory and regulatory obligations.

[13] Under the Communications Act the FCC may at any time, upon public complaint or sua sponte, review the programming selections of its licensees to ascertain whether they are complying with the requirements of the Act, in particular the requirement that the licensee act in the public interest. 47 U.S.C. § 308(b). The FCC routinely reviews complaints sim-

ilar to those raised by the plaintiffs.[35]

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35. See, e.g., KMAP, Inc., 72 F.C.C.2d 241 (1979) (suppression of news concerning United Farm Workers Movement); Right to Life of Louisville, Inc., 59 F.C.C.2d 1103 (1976) (refusal to broadcast photographs of live fetuses in womb); RKO General, Inc., 46 F.C.C.2d 240 (1974) (failure to air program about Passover); Representative Patsy Mink (WHAR), 59 F.C.C.2d 987 (1967) (failure to broadcast strip mining program); William Harsha, 31 F.C.C.2d 847 (1971) (refusal to allow George Jessel's criticism of "The New York Times" and "The Washington Post"); Mrs. Alexandra Mark, 34 F.C.C.2d 434 (1974), aff'd Mark v. FCC, 468 F.2d 266 (1st Cir. 1972) (refusal to allow comments concerning astrology and astrological sign reading); Citizens Communications Center, 25 F.C.C. 2d 705 (1970) (refusal to air intimate scene between Black and White actors); Letter to Richard L. Ottinger, 31 F.C.C.2d 852 (1970) (editing of remarks on Chicago conspiracy trial); Gross Telecasting, Inc. 14 F.C.C.2d 239 (1968) (news slanting for private interests of licensee); Tri-State Broadcasting Co., Inc., 59 F.C.C.2d 1240 (1976) (alleged news distortion to promote interests of advertisers); Public Communications, Inc., 49 F.C.C.2d 83 (1974) (deletion of reference to product in entertainer's monologue); Screen Gems Stations, Inc., 46 F.C.C.2d 252 (1974), recon. denied, 51 F.C.C.2d 557 (1975) (broadcast of Sugar Bowl would be contrary to public interest because the game discriminates against Blacks); Columbia Broadcasting System (Mobile Homes), 43 F.C.C.2d 1266 (1973) ("60 Minutes" segment on mobile homes failed to disclose CBS's interest in a

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If the FCC determines that a licensee has engaged in improper programming it can impose a variety of remedial sanctions including: admonishment of the licensee for irresponsible programming

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(footnote continued from preceding page) Florida development); Mark Lane, 37 F.C.C.2d 630 (1972) (deletion of remarks in discussion of Viet Name War); National Broadcasting Company (Chet Huntley), 14 F.C.C.2d 713 (1968) (Chet Huntley commentary re: Wholesome Meat Act of 1967 failed to disclose his ranching interests); KTYM (Anti-Defamation League), 4 F.C.C. 2d 190 (1966), aff'd 403 F.2d 169 (D.C. Cir. 1968), cert. denied, 394 U.S. 930, 89 S.Ct. 1190, 22 L.Ed.2d 459 (1969) (broadcast of allegedly anti-Semitic remarks); Bernard Hanft, 14 F.C.C.2d 364 (1968) (failure to cover department store picketing); Columbia Broadcasting System (WBBM-TV), 18 F.C.C.2d 124 (1969) (allegation that "pot party" documentary was staged by broadcaster); Columbia Broadcasting System (Poor People's Campaign), 17 P & F Rad. Reg. 2d 843 (1969) (coverage of Poor People's Campaign allegedly slanted and staged); Radio Station WSNT, Inc. 27 F.C.C.2d 993 (1971) (failure to cover Black organization's activities); Time-Life Broadcast, Inc. (KOGO-TV), 33 F.C.C.2d 1050 (1972) (allegations of "Anglo bias" in the news); Hunger in America, 20 F.C.C.2d 143 (1969) (documentary allegedly misleading and staged); Lincoln County Broadcasters, Inc. 51 F.C.C.2d 65 (1975) (broadcast of zoning decision for political reasons).

judgments, Columbia Broadcasting System (WBBM-TV), imposition of a forfeiture for programming inconsistent with the public interest, Illinois Citizens Committee for Broadcasting v. F.C.C., 515 F.2d 397 (D. C. Cir. 1974); declaration that the licensee has failed to comply with FCC policies, Representative Patsy Mink, issuance of a "short term" renewal, CBS, Inc., 69 F.C.C.2d 1082(1978); desingation of license renewal application for full evidentiary hearing, WTWV, Inc., 52 F.C.C. 2d 633 (1977); and denial of license renewal.[36]

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36. Indeed in Alabama Educational Television Commission, 50 F.C.C.2d 461 (1975) the FCC denied AETC's license renewal application because of its finding that AETC's programming discriminated against Blacks.

VII. Conclusion

The decisions of AETC and the University of Houston to cancel "Death of a Princess" did not violate the First Amendment rights of the plaintiffs. The plaintiffs have no constitutional right to compel the broadcast of the program. Accordingly, we find that the District Court for the Northern District of Alabama properly awarded summary judgment to AETC. We also find that the District Court for the Southern District of Texas erred in issuing its order requiring KUHT-TV to broadcast the program.

The judgment of the District Court for the Northern District of Alabama is AFFIRMED.

The judgment of the District Court for the Southern District of Texas is REVERSED and REMANDED. On remand the District Court shall dissolve the injunctive relief and render judgment for appellants.

RUBIN, Circuit Judge, with whom POLLITZ, RANDALL and WILLIAMS, Circuit Judges, join, specially concurring.

While I join in the result reached by the majority, I reach my conclusion on a different basis. Therefore, I join in the views expressed by Judge Garwood and add:

The sensitive and important issues in these cases cannot be resolved simply by attempting to decide whether a television station operated by a state agency is, or is not, a public forum. That term is but a label, developed to describe a location the use of which is open to the public. It does not express a definition but a conclusion.[1] The limitations imposed

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1. See Karst, Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad, 37 Ohio St.L.J. 247, 254 (1976).

by the first amendment on the operation of a medium of communication cannot be determined by application of the rules governing freedom of expression in streets and other areas that by tradition or design serve as platforms for expression subject only to reasonable time, place, and manner restrictions and free from content control.

The issue directly presented can be stated simply: whether an individual viewer has a right to compel a television station operated by a state agency to broadcast a single program previously scheduled by an employee of the agency that a higher-ranking state official has decided, because of its content, to cancel. This pretermits the factual questions whether the program was canceled for what the dissent calls "legitimate reasons" and whether the official's objection to the content of the program and

to its political implications was in either of these cases the sole reason for canceling "Death of a Princess" or merely the decisive one. Although these are not unimportant inquiries, they do not focus on the crucial issue: how does the first amendment control state action when the state is operating a television station?

Determination of the constitutional limitations that result because a television licensee is a state agency rather than a private agency must take into account not only the rights of viewers but number of other considerations. The license is federally bestowed. The state agency licensee has both a statutory duty to comply wiht the rules and regulations governing the use of its license[2]

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2. 47 U.S.C. § 303; see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-380, 89 S.Ct. 1794, 1800-01, 23 L.Ed.2d 371, 382-83 (1969).

and, like other licensees,[3] the statutory right to determine the way in which it shall fulfill that duty.[4] Those state employees who are charged with operation of the station, whether high or low in the managerial hierarchy, may have some right to free expression, which may be stronger is, for example, they function in an academic environment devoted to freedom of inquiry.[5] Those

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3. See Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 291 (D.C. Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976).

4. See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 109-10, 93 S.Ct. 2080, 2089-90, 36 L.Ed. 2d 772, 787-88 (1973); 47 U.S.C. § 326; Note, Broadcast Deregulation and the First Amendment: Restraints on Private Control of the Publicly Owned Forum, 55 N.Y.U.L.Rev. 517, 518, 521 (1980).

5. See Bazaar v. Fortune, 476 F.2d 570, 580 (5th Cir.)("[W]e must take note of the historical role of the University in expressing opinions which may well not make favor with the majority of society and in serving in the vanguard in the

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who want access to the medium in order not to view and listen but to disseminate a message must also be considered. Viewers also have an interest in the content of programs, not only because of their "right to see" but also because the state agency is financed at least in part by viewers as taxpayers.

These interests are all entitled to consideration and some or all of them may be accorded constitutional protection. Whether a viewer has a right, therefore, to see a single program that has been canceled by station management cannot be determined by focusing only on

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(footnote continued from preceding page) fight for freedom of expression and opinion."), aff'd as modified en banc, 489 F.2d 225 (5th Cir. 1973)(per curiam) cert. denied, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974); Brooks v. Auburn Univ., 412 F.2d 1171, 1173 (5th Cir. 1969) ("'A school may not stifle dissent because the subject matter is out of favor. Free expression is itself a vital part of the educational process.'")(quoting Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 704 (5th Cir. 1968)(Godbold, J., concurring)).

the interests of the viewer.[6] The interests of other persons and the function the state is discharging must also be considered, for the duties imposed on the state in connection with its various activities depend in part on the functions served by those activities.

Even the fact that the state is engaged in television broadcasting does not fully define the constitutional limitations on its actions, for such broadcasting might be designed to

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6. See generally Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770, 777 (1974)(plurality opinion):

> Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.

serve differing purposes. Licensing is not destiny. That the state is the licensee does not predetermine the station's function. The state may elect the station's mission, so long as this mission is consistent with the station's license and the Constitution. The prerogatives of managers, editors, and programmers, the rights of access of those who seek exposure, and the rights of viewers, as well as the prerogatives of the licensee itself as a state agency, are at least in large part determined by this mission.

All, or in other instances a part, of a station's programs might be devoted to providing a medium for the communication of competing views.[7] Some

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7. Cf. City of Madison Joint School District v. Wisconsin Emp. Comm'n., 429 U.S. 167, 175, 97 S.Ct. 421, 426, 50 L.Ed.2d 376, 384 (1976)("State has opened a forum for direct citizen involvement").

channels on cable television networks and some viewer or listener call-in programs on television and radio stations are of this kind. Some television stations are devoted entirely to educational purposes, designed solely for pedagogy. Others may be operated to furnish a varied menu of entertainment having greater cultural and educational value than the programs available on commercial stations. While the record is not clear, it appears that the two stations involved in these cases were of this sort. Neither station has been shown to have been a magazine of the air, a forum for all views, or a dispassionate communicator on issues of the day. Each appears to serve instead a diet that differs from commercial television primarily in appeal to a somewhat more sophisticated audience, the absence of commercials, and efforts to raise funds from viewers.

The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions. State agencies publish alumni bulletins, newsletters devoted to better farming practices, and law reviews; they operate or subsidize art museums and theater companies and student newspapers. The federal government operates the Voice of America[8] and Radio Free Europe and Radio Liberty,[9] publishes "journals, magazines, periodicals, and similar publications" that are "necessary in the transaction of the public business,"[10] including newspapers for branches of the Armed Forces, and pays the salaries of many federal officials who, like the

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8. 22 U.S.C. § 1463 (1976 & Supp. IV 1980).

9. Id. §§ 2871-2879.

10. 44 U.S.C. § 1108.

President's Press Secretary, communicate with the public through the media. The first amendment does not dictate that what will be said or performed or published or broadcast in these activities will be entirely content-neutral. In those activities that, like television broadcasting to the general public, depend in part on audience interest, appraisal of audience interest and suitability for publication or broadcast inevitably involves judgment of content.[11]

If the state is conducting an activity that functions as a marketplace of ideas, the Constitution requires

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11. A recent article on one of these activities, Voice of America, vividly illustrates this point. Bethell, Propaganda Warts, Harper's, May 1982, at 19. Indeed, this article describes an incident similar to the ones at issue in these cases. Id. at 21.

content neutrality. Thus, a state university may not override editorial freedom for student newspapers.[12] If, however, the state's activity is devoted to a specific function rather than general news dissemination or free exposition of ideas, the state may regulate content in order to prevent hampering the primary function of the activity,[13] just as it may to some degree restrict the content of material distributed or displayed on military estab-

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12. See Bazaar v. Fortune, 476 F.2d at 573-75; Dickey v. Alabama State Bd. of Educ., 273 F.Supp. 613, 617-18 (M.D. Ala. 1967), vacated as moot sub nom. Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

13. See Adderly v. Florida, 385 U.S. 39, 47, 87 S.Ct. 242, 247, 17 L.Ed.2d 149, 156 (1966)("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

blishments,[14] in prisons,[15] on public buses,[16] or in public hospitals.[17]

All of the opinions in Board of Educ. v. Pico, _____ U.S._____, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), recognize such a distinction either implicitly or expressly.[18] Justice Brennan's opinion for the

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14. Greer v. Spock, 424 U.S. 828, 836-40, 96 S.Ct. 1211, 1216-18, 47 L.Ed.2d 505, 513-15 (1976); id. at 843, 96 S.Ct. at 1220, 47 L.Ed.2d at 517-18 (Powell, J., concurring).

15. See Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 134-35, 97 S.Ct. 2532, 2542-43, 53 L.Ed.2d 629, 644-45 (1977).

16. Lehman v. City of Shaker Heights, 418 U.S. at 302-04, 94 S.Ct. at 2717-18, 41 L.Ed.2d at 776-78.

17. Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 670 F.2d 629, 631-32 & n.2 (5th Cir. 1982)(per curiam).

18. Seven Justices filed opinions in Pico. The Court divided four-four on the constitutional issue of the extent to which the first amendment limits the discretion of a school board to remove books from a school library. Justice White concurred in the judgment of the
(footnote continued on following page)

plurality stresses "the limited nature of the substantive question" presented by the challenge to a school board's removal of books from a school library.[19] It does not classify the library as a public forum and emphasizes that the challenged action "does not involve the

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(footnote continued from preceding page) Court but did not reach this issue. See generally Maj. Op. supra, 688 F.2d at 1045, 1052, n.30.

19. ____ U.S. at ____, 102 S.Ct. at 2805, 73 L.Ed.2d at 443; see id. at ____, 102 S.Ct. at 2806, 73 L.Ed.2d at 444:

> In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as two distinct questions. First, Does the First Amendment impose any limitations upon the discretion of petitioners to remove library books from the Island Trees High School and Junior High School? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations? (Emphasis in original).

acquisition of books."[20] It postulates that "all First Amendment rights accorded to students must be construed 'in light of the special characteristics of the school environment,'"[21] just as, I submit, the rights of television viewers must be construed in the light of the special characteristics of the television medium and the mission of a particular state-operated television station. The plurality opinion turns on "the unique role of the school library"[22]

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20. Id. at ____, 102 S.Ct. at 2805, 73 L.Ed.2d at 444 (emphasis in original).

21. Id. at ____, 102 S.Ct. at 2808-09, 73 L.Ed.2d at 447 (quoting Tinker v. Des Moines School Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737 (1969); see note 28 and accompanying text infra.

22. Id. at ____, 102 S.Ct. at 2809, 73 L.Ed.2d at 448.

> A school library is ... is "a place dedicated to quiet, to knowledge, and to beauty." Brown v. Louisiana, 383 U.S. 131, 142 [86 S.Ct. 719, 724, 15 L.Ed.2d 637]

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as distinguished, in particular, from the determination of school curricula.[23] Because the plurality was addressing only the "suppression of ideas," it could write without considering "the discretion of a local school board to choose books to add to the libraries of their schools."[24]

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(1966)(Opinion of Fortas, J.). Keyishian v. Board of Regents, 385 U.S. 589[,603, 87 S.Ct. 675, 684, 17 L.Ed.2d 629] (1967), observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." The school library is the principal locus of such freedom. Id. at ____, 102 S.Ct. at 2809, 73 L.Ed.2d at 448 (footnote omitted).

23. ____ U.S. at ____, 102 S.Ct. at 2809, 73 L.Ed.2d at 448.

24. Id. at ____, 102 S.Ct. at 2810, 73 L.Ed.2d at 450.

In his concurring opinion, Justice Blackmun is willing to say only that "certain forms of state discrimination between ideas are improper."[25] He "doubt[s] that there is a theoretical distinction between removal of a book and failure to acquire a book.[26] Therefore, he is willing to say only that "school officials may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved."[27] He also notes that the nature of the governmental activity at issue is

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25. Id. at ____, 102 S.Ct. at 2814, 73 L.Ed.2d at 454 (concurring in part and concurring in the judgment)(emphasis in original).

26. Id. at ____ n.1, 102 S.Ct. at 2814 n.1., 73 L.Ed.2d at 454 n.1.

27. Id. at ____, 102 S.Ct. at 2814, 73 L.Ed.2d at 455 (emphasis in original).

significant in determining to what extent the first amendment limits government officials' discretion to regulate speech.[28]

The dissenters do not agree that students have a constitutional right to receive information or that "a school board [has a duty to] affirmatively aid [a] speaker in its communication with the recipient."[29] "[T]he 'right to receive information and ideas' ... does not carry with it the concomitant right to have those ideas affirmatively

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28. See id. at ____, 102 S.Ct. at 2814, 73 L.Ed.2d at 454:

> [T]he unique environment of the school places substantial limits on the extent to which official decisions may be restrained by the First Amendment values. But that environment also makes it particularly important that some limits be imposed.

(Emphasis in original).

29. Id. at ____, 102 S.Ct. at 2818, 73 L.Ed.2d at 460 (Burger, C.J., dissenting).

provided at a particular place by the government."[30] In his dissenting opinion, Justice Powell adds: "[T]he new found right [to receive ideas] finds no support in the First Amendment precedents of this Court."[31]

All of the opinions in Pico, therefore, seem to support the distinction between the application of the first amendment to limitations on the use of a public forum and the restrictions it

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30. Id. at ____, 102 S.Ct. at 2819, 73 L.Ed.2d at 460 (quoting Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542, 549 (1969).

31. Id. at ____, 102 S.Ct. at 2822, 73 L.Ed.2d at 465; accord, id. at ____, 102 S.Ct. at 2830, 73 L.Ed.2d at 474 (Rehnquist, J., dissenting)("The right described by [Justice Brennan's plurality opinion] has never been recognized in the decisions of this Court and is not supported by their rationale."); see id. at ____, 102 S.Ct. at 2835, 73 L.Ed.2d at 481 (O'Connor, J., dissenting).

may impose on governmental action in conducting a particular activity. Whether the views of the plurality or those of the dissenters express the constitutional interpretation that will ultimately be adopted, Pico seems to endorse the view that the nature of the activity determines the strictures the first amendment places on governmental action.

While the Mobile and Houston television stations are operated by state agencies, neither station is designed to function as a marketplace of ideas, a medium open to all who have a message, whatever its nature. The staff of each station had made an initial programming decision based in part on their assessment of the content of "Death of a Princess." Had the initial decision been not to use the program, the argument might have been made that this too was censorship and violated the poten-

tial viewers' right to see. If a decision is initially made at one level to use a program and is then reversed at a higher level, the content assessment involved is more apparent, but it is not necessarily converted thereby from legitimate programming into forbidden censorship.

Judicial reassessment of the propriety of a programming decision made in operating a television station involves not only interference with station management but also reevaluation of all of the content-quality-audience reaction factors that enter into a decision to use or not to use a program by a medium that cannot possibly, by its very nature, accommodate everything that every viewer might desire. With deference to the dicta observations made in the Pico plurality opinion, our reexamination of such a decision cannot

logically be confined to occasions when higher officials overrule subordinates. If it is forbidden censorship for the higher official to cancel a program, it is equally censorship for the lower officials to decide initially to reject a program.

The Constitution is categoric but it does not command the theoretical. The state's discretion is confined by the functions it may perform as a broadcast licensee, and the purpose to which it has dedicated its license. Moreover, these cases involve only one program, not a licensee policy or practice of, for example, favoring only one political party, or of broadcasting racially or religiously discriminatory views.[32]

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32. See Board of Educ. v. Pico, ___ U.S. ___, 102 S.Ct. at 2810, 73 L.Ed. 2d at 449 (plurality opinion); id. at ___, 102 S.Ct. at 2813, 73 L.Ed.2d at 453 (Blackmun, J., concurring in part
(footnote continued on following page)

Neither complaint even alleges that either station has a policy of curtailing access to ideas. Each seeks only to compel the defendant station to show a single program. Judicial intervention might be required if these or other licensees should adopt or follow policies or practices that transgress constitutional rights. But, one call, even if it is ill-advised, does not constitute a policy or practice, and judicial intervention does not appear required or warranted for a single programming decision.

For these reasons, although I cannot agree with all of the majority opinion, particularly its discussion of the application of the public forum doctrine, I concur in the result.

(footnote continued from preceding page) and concurring in the judgment); id. at ____, 102 S.Ct. at 2827, 73 L.Ed.2d at 470 (Rehnquist, J., dissenting).

KRAVITCH, Circuit Judge, dissenting:

I agree with the analysis in Judge Johnson's thorough and well-reasoned dissent, with one exception: his statement that the government's decision to withdraw a program becomes presumptively unconstitutional once a plaintiff has shown that the decision was made because of the program's "substantive content." In my view, in addition to "substantive content," there must be shown an improper motivation, an intent to "restrict[] access to the political ideas or social perspectives discussed ...." Board of Education v. Pico, ____ U.S. ____, ____, 102 S.Ct. 2799, 2814, 73 L.Ed.2d 435 (1982)(Blackmun, J., concurring). In this regard I agree with Judge Reavley. I do not join Judge Reavley's dissent, however, because his standard suggests that intent to suppress must be the sole factor before the withdrawal vio-

lates the First Amendment. The Pico plurality explicitly stated that an improper motive is a "decisive factor" and makes the withdrawal unconstitutional if it is a "substantial factor." Id. at ____ & n.22, 102 S.Ct. at 2809, 2810 & n.22 (plurality opinion of Brennan, J., Marshall, J., and Stevens, J.). The improper motivation need not be the only factor in the withdrawal decision. For these reasons I write separately.

FRANK M. JOHNSON, Jr., Circuit Judge, with whom HATCHETT, ANDERSON, TATE and THOMAS A. CLARK, Circuit Judges, join, dissenting.

I dissent because I am convinced that the majority has committed a serious error in applying the law to these cases. The clearly defined issue in these appeals is whether the executive officers of a state operated public tele-

vision station may cancel a previously scheduled program because it presents a point of view disagreeable to the religious and political regime of a foreign country. The majority opinion permitting cancellation on these grounds flies completely in the face of the First Amendment and our tradition of vigilance against governmental censorship of political and religious expression.

Death of a Princess is a dramatization of one man's investigation of the circumstances and motives which led to the July 1977 execution of a Saudi Arabian princess and her lover for adultery. The film presents narrative and recreated interviews which examine the religious, cultural, and political hierarchy of Saudi Arabian society. Death of a Princess is directly critical of many aspects of the Saudi regime, including the government's enforcement

of religious and cultural proscriptions.

The Saudi government reacted strongly to the production and distribution of Death of a Princess. After the film was shown in Great Britain, Saudi Arabia temporarily recalled its ambassador in protest. The Saudis again evidenced strong displeasure when PBS scheduled the film for broadcast in May 1980 as part of its World series.

The record in Muir reveals that during the period immediately preceding the May 12 air date the Alabama Educational Television Commission received numerous telephone calls expressing concern over the scheduled telecast of Death of a Princess.[1] William Harbert of

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1. The district court in Muir entered its orders denying the preliminary injunction and granting defendants' motion for summary judgment in this case without benefit of oral evidence and on the basis of very limited discovery. Assuming that the court did not abuse its dis-
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Harbert Construction Company, an Alabama firm with substantial Saudi and Middle Eastern business, along with a representative of the Birmingham Area Chamber of Commerce, personally contacted Henry Bonner, program manager of the Alabama Educational Television Commission, to express their concern regarding the proposed broadcast. On May 9th Bonner reported these conversations and the fact of the telephone calls to Edward Wegener, general manager

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(footnote continued from preceding page) cretion in denying the preliminary injunction, the issue of summary judgment remains. In reviewing the appropriateness of summary judgment this Court must view the facts in the light most favorable to the nonmoving party to determine (i) whether there is a genuine issue as to any material fact, and (ii) whether the moving party is entitled to judgment as a matter of law. Fed.R.Civ. P. 56 (c); Northeast Ga. Radiological Associates, P.C. v. Tidwell, 670 F.2d 507, 510 (5th Cir. 1982); Joplin v. Bias, 631 F.2d 1235, 1237 (5th Cir. 1980).

Of The Alabama Educational Television Commission, who in turn contacted Jacob Walker, Chairman of the Alabama Educational Television Commission.

Walker scheduled a telephone conference with the other commissioners for later in the day. At some point, Walker spoke directly with Harbert, who supplied him with most or all of the facts relied on by the commission in reaching its conclusion that "broadcast of the program could expose Alabama citizens in the Middle East to physical and emotional abuse through rioting, physical assault and property damage." The plaintiffs unsuccessfully maintained that the decision "was one made out of political considerations." (R. at 96.)

The district court in Barnstone found that Dr. Patrick Nicholson, Vice President for Public Information and University Relations of the University of

Houston, unilaterally decided to prevent broadcast of Death of a Princess on the University operated television station, KUHT-TV. Barnstone v. University of Houston, 514 F.Supp. 670 (S.D. Tex. 1980). Nicholson, who had never made a programming decision in his 17 years' tenure and who was opposed in his decision to cancel the scheduled program by the station's programming director and eventually by the general manager of KUHT-TV, cited as his reason the "strong and understandable objections by the government of Saudi Arabia." Id. at 674. While Dr. Nicholson testified that he feared the broadcast might "exacerbate the situation in the Middle East," the court found that he was "entirely unable ... to explain what he meant by this phrase ...." Id. at 691.

The majority of this Court--now in the twilight of its long and honorable existence[2]--has affirmed Muir and reversed Barnstone in an opinion which grants state authorities unlimited discretion to regulate the content of public television within their control. Because state law and FCC licensing grant defendants full broadcasting authority over these stations in their respective areas,

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2. By Public Law 96-452, 94 Stat. 1994, effective October 1, 1981, the United States Congress divided the Fifth Circuit Court of Appeals into two new autonomous circuits--the new Fifth Circuit and the Eleventh Circuit. The cases now under consideration, as required by the Act, are being considered by the judges of the former Fifth Circuit as if the legislation dividing the circuit "had not been enacted." Pub. Law 96-452 § 9(3). Thus, having been established by Congress in 1891 as one of the original Circuit Courts of Appeals, the Fifth Circuit is indeed in its twilight.

the majority's decision confers unrestricted control over a monopoly market. See Ala. Code §§ 16-7-1-5; Barnstone v. University of Houston, supra, 514 F. Supp. at 672-73, 680. By finding no other restriction on state operated television than that imposed by federal regulation, the Court has elevated "the Communications Act above the Constitution." Barnstone, supra, 514 F.Supp. at 686. Moreover, the Court has abdicated its duty in an area in which the plaintiffs have no comparable remedy.

The freedom of expression protected by the First Amendment encompasses the rights of both speakers and listeners. CBS, Inc. v. FCC, 453 U.S. 367, 101 S. Ct. 2813, 2829, 69 L.Ed.2d 706 (1981); FCC v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775, 800, 98 S.Ct. 2096, 2114, 56 L.Ed.2d 697 (1978); First Nat'l Bank of Boston v. Bellotti,

435 U.S. 765, 776-77, 98 S.Ct. 1407, 1415-1416, 55 L.Ed.2d 707 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun., Inc., 425 U.S. 748, 756, 96 S.Ct. 1817, 1822, 48 L.Ed.2d 346 (1976); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102, 93 S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973); Kleindienst v. Mandel, 408 U.S. 753, 762-63, 92 S.Ct. 2576, 2581-82, 33 L.Ed.2d 683 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90, 89 S.Ct. 1794, 1804-1807, 23 L.Ed.2d 371 (1969); Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed. 2d 542 (1969); Lamont v. Postmaster General, 381 U.S. 301, 305-07, 85 S.Ct. 1493, 1495-1497, 14 L.Ed.2d 398 (1965). As the Supreme Court unanimously held in Red Lion, supra:

> It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged ....

395 U.S. at 390, 89 S.Ct. at 1806 (citations omitted). The proper inquiry for this Court, then, should not be whether the Communications Act grants state broadcasters editorial discretion, but whether the action of state officials in these cases abridged free expression protected by the First Amendment. See Bellotti, supra.

Our system of constitutional protection clearly reflects that government may not restrict the free discussion of

public issues on the basis of the political, religious, or ideological content of the message. Freedom of expression concerning public issues "is at the heart of the First Amendment's protection." First Nat'l Bank of Boston v. Bellotti, supra, 435 U.S. at 776, 98 S.Ct. at 1415; Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436; 16 L.Ed.2d 484 (1966); Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964)("speech concerning public affairs is more than self-expression; it is the essence of self-government"). Self-government suffers when those in power suppress competing views on public issues. Bellotti, supra, 435 U.S. at 777 n.12, 98 S.Ct. at 1416 n.12. As a result, federal courts have consistently struck down content-based restrictions on the discussion of public issues. Carey v. Brown, 447 U.S. 455,

100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (statute which prohibited all peaceful picketing except for labor pickets impermissibly discriminated between lawful and unlawful activity on the basis of the content of the demonstrator's communication); First Nat'l Bank of Boston v. Bellotti, supra, (statute which prevented corporate expression on tax issue); Virginia State Board of Pharmacy v. Va. Citizens, supra, (invalidating prohibition on dissemination of over-the-counter drug prices); Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-90, 33 L.Ed.2d 212 (1972)(invalidating picketing ordinance which permitted labor picketing); Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966)(invalidating prohibition against discussion of political candidates on the last day of the

campaign); Lamont v. Postmaster General, supra, (unjustifiable burden on the addressee's First Amendment rights to require that intended recipient of "communist" material affirmatively request that it be delivered); see Board of Educ. v. Pico, ____ U.S. ____, ____, 102 S.Ct. 2799, 2810, 73 L.Ed.2d 435 (1982) (plurality) ("[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'") (quoting West Virginia v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943)).

This Court held in Bazaar v. Fortune, 476 F.2d 570, 574, aff'd as modified en banc, 489 F.2d 225 (5th Cir. 1973), cert. denied, 416 U.S. 995, 94 S.Ct.

2409, 40 L.Ed.2d 774 (1974), that once the state recognizes an activity which has elements of free expression it must operate the activity in accord with First Amendment principles. In Fortune this Court affirmed an order restraining University of Mississippi officials from interfering with the publication of a university sponsored literary magazine they considered controversial. The Court held in Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969), that the state university unconstitutionally abridged the First Amendment rights of disappointed listeners when Auburn's president withdrew a speaking invitation extended to the Reverend William Sloan Coffin, then Chaplain of Yale University, because of concern over what Reverend Coffin might speak about. The law is clear in this nation and up until now in this Circuit that once the

government establishes a particular medium for the expression of different viewpoints it may not later intervene for the purpose of eliminating unpopular views. The law as I read and understand it has never condoned censorship in the name of editorial discretion. See, e.g., Board of Educ. v. Pico, supra, ____ U.S. at ____, 102 S.Ct. at 2814 (Blackmun, J., concurring) ["[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons."] (footnote omitted).

The majority opinion completely ignores the critical issue in these cases by concluding that "[t]he state officials in charge of AETC and KUHT-TV have simply exercised their statutorily mandated discretion and decided not to show a particular program at a particu-

lar time." The very simple answer to that position is that FCC regulation is designed neither to preempt judicial scrutiny nor to redress state censorship as alleged in these cases.

Federal regulation of the broadcast media, for the most part, reflects the government's attempt to balance the allocation of a scarce resource with the First Amendment interests of private broadcasters and the public. See Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 386-392, 89 S.Ct. at 1804-1808; CBS, Inc. v. Democratic Nat'l Comm., supra, 412 U.S. at 103-114, 93 S.Ct. at 2086-2092. The fact that state operated television stations are entitled to exercise editorial discretion, however, does not absolve them of their First Amendment responsibilities. "The First Amendment protects the press from governmental interference; it confers no analogous

protection on the Government." CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. at 139, 93 S.Ct. at 2104 (Stewart, J., concurring)(emphasis in original); Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390, 89 S.Ct. at 1806 (First Amendment protects against governmental monopolization of the free marketplace of ideas). The majority commits fundamental error when it permits state broadcasters to ride on the coattails of their private counterparts. Even when the majority admits that state broadcasters "are without the protection of the First Amendment," it offers no principled reason why this "implies only that government could possibly impose restrictions on these licensees which it could not impose on private licensees."

In addition, while it is true that the FCC hears complaints similar to those raised in these cases, it is also

true that the FCC routinely denies relief. A brief review of the cases cited by the majority reveals that the FCC steadfastly refuses to depart from its "longstanding policy of deferring to licensee discretion." Right to Life, Inc. v. WAVE-TV, 59 F.C.C.2d 1103 (1976). As the FCC itself has stated, the Commission "is prohibited by the First Amendment to the Constitution and Section 326 of the Communications Act of 1934 ... from censoring broadcast material, and it does not attempt to direct licensees in the selection or presentation of specific material." KMAP, Inc., 72 F.C.C.2d 241, 244 (1979):

> [B]ecause of the sensitive First Amendment considerations involved, the Commission must strike a delicate balance between ensuring that licensees operate in the public interest and avoiding unnecessary interference in their programming decisions. Thus, the Commission has made clear that both the responsibility for and discretion in the selection of broadcast material rests with licensees.

Id.; RKO General, Inc., 46 F.C.C.2d 240, 244 (1974). In its pursuit of the public interest the FCC routinely defers to licensee "discretion as to the manner in which a controversial issue is to be covered, including such matters as appropriate spokesman and program format." William Harsha, 31 F.C.C.2d 847 (1971).[3]

In order for the FCC to take adverse action against a broadcaster for suppressing a particular viewpoint, the petitioner "must present substantial extrinsic evidence of intentional and specific inci-

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3. Although a controversy arose over the broadcast of Death of a Princess, it does not appear that the program itself dealt with a controversy within the meaning of the fairness doctrine. See RKO General, Inc., 46 F.C.C.2d 240, 243 (1974).

dents" of suppression. KMAP, Inc., supra, 72 F.C.C.2d at 244; Citizens Communications Center, 25 F.C.C.2d 705, 707 (1970)(evidence must firmly establish discriminatory policy inconsistent with the public interest); see Stone v. FCC, 466 F.2d 316, 322 (D.C. Cir. 1972)(court defers to expertise and experience of commission and will reverse grant of application only if commission's position is arbitrary, capricious, or unreasonable).[4] Complaints

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4. The substantial quantum of proof a petitioner must produce in order to persuade the FCC to deny a state broadcaster's license is clearly illustrated in Alabama Educational Television Commission, 50 F.C.C.2d 461 (1975). After finding overwhelming evidence of "serious misconduct involving discriminatory programming practices and an all but complete failure to serve the needs of Alabama's black residents" the Commission declined to renew the AETC's license. 50 F.C.C.2d at 477. In rendering its decision, the FCC emphasized the practically uncontroverted evidence of AETC's racially discriminatory policies. "The systematic exclusion of blacks and of programming designed to serve their distinctive interests is
(footnote continued on following page)

regarding individual cancellation decisions are regularly denied. E.g., Right to Life of Louisville, Inc., 59 F.C.C.2d 1103 (1976); RKO General, Inc., 46 F.C.C.2d 240 (1974); William Harsha, 31 F.C.C.2d 847 (1971); Citizens Communications Center, 25 F.C.C.2d 705 (1970).

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thus demonstrated by the substantial evidence adduced by petitioners that blacks rarely appeared on AETC programs; that no black instructors were employed in connection with locally-produced in-school programs; and that unexplained decisions or inconsistently applied policies forced the pre-emption of almost all black-oriented network programming." Id. at 469. The Commission cautioned, however, that "[a]ny one of these decisions [to cancel black-oriented programs], taken by itself, might be reasonably regarded as a valid exercise of a licensee's discretion as to scheduling or program content." Id. In taking action the FCC acknowledged that it had refrained from imposing the same sanctions on AETC that it would have imposed on a private broadcaster on account of the considerable deference the Commission traditionally afforded state authority. See Puerto Rico Telephone Co., 47 F.C.C.2d 1166 (1974).

Thus it is clear that the majority's deference to the FCC in these cases that present important constitutional questions amounts to nothing more than "... a promise to the ear ... " which will most certainly be broken "to the hope." See Cuthbert v. United States, 278 F.2d 220 (5th Cir. 1960). Relying on the system of FCC regulation, the majority has granted state broadcasters immunity from constitutional scrutiny. There is nothing, however, in the Communications Act or in the system of FCC regulation which prevents judicial scrutiny. On the contrary, the Supreme Court has recognized the need for vigilance in the face of governmental regulation. See, e.g., Red Lion, supra, 395 U.S. at 390, 89 S.Ct. at 1806; CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. at 104-05, 93 S.Ct. at 2087-88. To rely on FCC regulation is to create a substantial gap in the protection of First Amendment

interests. Because the FCC does not distinguish between private and public broadcasters in its regulation of the airwaves, see City of New York Mun. Broadcasting System, 56 F.C.C.2d 169 (1975), it provides no protection from the kind of state censorship alleged in these cases.

The concurring opinions of Judges Rubin and Garwood erroneously suggest that official censorship may only be found when the state operates a medium which is "content neutral," see, e.g., City of Madison Joint School Dist. v. Wisconsin Emp Rel. Com'n, 429 U.S. 167, 175, 97 S.Ct. 421, 426, 50 L.Ed.2d 376 (1976), or which is a "public forum." E.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). In all other cases, the concurrences suppose, the state must be given unbridled authority to discriminate among different viewpoints, even if

the state chooses to suppress a particular point of view solely on the basis of the political, ideological, or religious content of the message. Otherwise, the opinions caution, any citizen would have the "right" to force the state operated televisions in this case to broadcast any program of his choosing.

These suppositions erroneously ignore the proper considerations a Court may give the editorial process, as demonstrated by this Court's previous experience. For example, the issue presented to this Court in Bazaar v. Fortune, supra, a case relied on to some extent by Judge Rubin, was not whether the University of Mississisippi's literary magazine was "content neutral" or whether any student had the "right" to force the English Department and its student editors to publish any given article or short story. The issue in Fortune was whether the Uni-

versity chancellor could prevent the distribution of the magazine because one of its short stories contained "inappropriate" materials criticizing contemporary race relations. 476 F.2d at 572-73. See Dickey v. Ala. State Bd. of Educ., 273 F.Supp. 613, 618-19 (M.D. Ala. 1967), vacated as moot sub nom. Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1969)(district court order recognizing restrictions on the editorial operation of a school newspaper but finding ban on criticism of the Governor an unreasonable restriction). Similarly, in Brooks v. Auburn, supra, the issue before this Court was not whether the speakers' committee was forced to disregard all guidelines in selecting a speaker or whether any given student had the "right" to name the next speaker who was to be invited to the University. The issue in Brooks was whether the University presi-

dent could effectively censor the political viewpoint of a previously chosen speaker by refusing to authorize payment of his expenses. 412 F.2d at 1172. In Brooks, as in Fortune, this Court concentrated on the particulars of the alleged censorship decision in the context of the existing editorial format. It was not necessary for the Court to find a "content neutral" or "open forum" setting in order to evaluate the claim of official censorship.

In the recent case of Board of Educ. v. Pico, ____ U.S. ____, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), both the plurality and Justice Blackmun recognized the presence of enforceable First Amendment rights, even within the context of a highly discretionary state function. As Justice Blackmun wrote, concurring: "In my view, we strike a proper balance here by holding that school officials may not

remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved." Id. at ____, 102 S.Ct. at 2814 (Blackmun, J., concurring). Unlike Judges Hill and Rubin, I find allegations of censorship in the context of state operated television broadcasting entitled to much greater scrutiny than similar allegations involving school board regulation of students' reading material. Public television stations "provide educational, cultural, and discussion programs which serve the general community." Senate report to the Public Broadcasting Act of 1967, 47 U.S.C.A. §§ 390-399, S.Rep. No. 222, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Ad. News 1772, 1782. AETC is specifically charged with the duty "of making the benefits of educational

television available to and promoting its use by inhabitants of Alabama ...." Ala. Code § 16-7-5. Viewed in the context of these stations' purposes and the framework of existing regulation, the editorial discretion of a state broadcaster is more circumscribed than that of a school board member. Moreover, the facts of both Muir and Barnstone reveal dramatic departures from established editorial practice in direct response to the urgings or implied threats of a foreign government.

Finally, the concurring opinions would appear to recognize official censorship by state television broadcasters when that censorship is conducted as a "policy or practice" of the state. Neither opinion, however, advances a principled distinction between censorship which is a "policy or practice" and that which is an individual overt act of sup-

pression. It is clear to me that the First Amendment does not prohibit censorship only when it reaches the level of state "policy." To do so would be to allow the state to abrogate the fundamental concept of individual civil liberty. See, e.g., Pickering v. Board of Educ., 391 U.S. 563, 574-75, 88 S.Ct. 1731, 1737-38, 20 L.Ed.2d 811 (1968).

It is the judiciary which is the ultimate arbiter of the fundamental rights involved in these cases.[5] Courts may not

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5. The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. West Virginia State Board of Education v.

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abdicate their duty by reference to a system of administrative regulation, or because they would prefer that the plaintiffs take their complaints elsewhere. We must review the allegations of state censorship in the context of television broadcasting according to applicable legal standards. The standard for evaluating the allegations of abridgement in these cases must be that which was articulated in Mt. Healthy School Dist. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). Once the plaintiff demonstrates that the government has silenced a message because of its substantive content, the government's decision becomes presumptively uncon-

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(footnote continued from preceding page) Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943); see Wesberry v. Sanders, 376 U.S. 1, 17-18, 84 S.Ct. 526, 534-35, 11 L.Ed.2d 481 (1964).

stitutional. The government should then be allowed to demonstrate that it would have taken the same action on the basis of legitimate reasons. Finally, the plaintiff should be given a full opportunity to refute the government's assertion.

Because of the importance of the values at stake, and the ability of the defendant usually to offer a colorably permissible reason for its actions, the trier of fact must critically examine the asserted rationale for the defendant's conduct. In Bazaar v. Fortune this Court rejected defendants' assertion that they were attempting to prevent the publication of a literary magazine because it contained obscenities when no action had been taken against similar writings found in the university library or on students' required reading lists. 476 F.2d at 578-

79.[6] Similarly, in Brooks v. Auburn, the Court rejected defendants' assertion that lawlessness would result from a speaker's engagement when defendants were unable to present suitable facts of potential reaction. 412 F.2d at 1173. In addition, the trier of fact must weigh the rationale for action with the extent of the action taken. An absolute ban on a particular program would require a stronger showing of justification than would a temporary withholding of the broadcast.

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6. As this Court concluded in Fortune:

> "... [W]e can only reiterate that speech cannot be stifled by the state merely because it would perhaps draw an adverse reaction from the majority of people, be they politicians or ordinary citizens, and newspapers. To come forth with such a rule would be to virtually read the First Amendment out of the Constitution and, thus, cost this nation one of its strongest tenets.

476 F.2d at 579.

No one would doubt that "broadcast media pose unique and special problems not present in the traditional free speech case." CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. at 101, 93 S.Ct. at 2086. The course of these cases amply demonstrates that proposition. The solution, however, is neither to deny the existence of constitutional rights nor to abdicate judicial responsibility. The solution is to face the problems squarely and resolve the issues accordingly.

The plaintiffs in Muir and Barnstone have made serious allegations of state censorship which the defendants have attempted to refute. Muir comes to us without benefit of a full hearing. The district court in Barnstone made substantial findings yet considered the evidence in light of an incorrect legal

standard.[7] I would remand both cases for redetermination in light of the correct legal standard and burden of proof.

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7. Judge McDonald found that KUHT-TV was a public forum and concluded that "decisions not to show programs on it may be challenged as prior restraint." 514 F.Supp. at 689. Evaluating the evidence accordingly, the court found that defendants' explanation for cancelling the program was "unacceptable as a matter of law." Id. at 691. As a result, it is not possible to determine how the district court would have evaluated the evidence in light of the Mt. Healthy standard.

REAVLEY, Circuit Judge, dissenting:

I cannot join the majority or concurring opinions for the reason that each of these television stations does far more than transmit expressions of the state. Our desire to free non-profit public broadcasting from judicial interference is no justification for pretending that the state is not relaying messages into the idea marketplace. I must conclude that the state encounters the First Amendment requirement of neutrality for reasons generally discussed in my original panel concurrence. Barnstone v. University of Houston, KUHT-TV, 660 F.2d 137, 138 (5th Cir. 1981).

On the other hand, I would not go so far as Judge Johnson does to make the state's decision presumptively unconstitutional whenever a program is not shown "because of its substantive content." State operated television stations should

be given more latitude, even to choose on the basis of substantive content, in their program selection. They should be entitled to pursue excellence, to build viewing audiences, to respond to what viewers want, and to consider the effect of their programs upon that audience. Bona fide programming decisions would not, for me, violate the First Amendment neutrality. Only if the decision to show or not to show were based upon viewpoint alone, in juxtaposition to the personal viewpoint of the programming authority or state superiors, entirely aside from any opinion as to program value or effect, would I regard neutrality abused and court action justifiable.*

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* The recent opinion of a plurality of the Supreme Court in Board of Educ. v. Pico, ___ U.S. ___, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), supports the analysis offered here and in my separate opinion in Barnstone. The plurality reaffirmed that government action intended to suppress viewpoints with which the government
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(footnote continued from preceding page) disagrees offends the First Amendment, and also confirmed the distinction between "content" discrimination and "viewpoint" suppression which I offer here.

> [Government officials] rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner .... Our Constitution does not permit the official suppression of ideas. Thus whether petitioners' removal of books from their school library denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondent access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.

____ U.S. ____, 102 S.Ct. at 2810 (footnote omitted) (citing Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); compare Barnstone, 660 F.2d at 141 & n.11 (concurring opinion). Moreover, for the reasons I have already explained, see 660 F.2d at 141 n.9, I believe that the factual differences between this case and Pico make this an even stronger case for the application of the First Amendment.

GARWOOD, Circuit Judge, concurring:

I concur in the majority opinion, and append these remarks only to point up two additional interrelated matters I believe significant.

First, plaintiffs are not attacking governmental "public" broadcasting as such. Nor do they seek to require its operation to be on a pure "open forum" basis--like an empty stage available to all comers--where each citizen can cause the broadcast of his or her program of choice, with the inevitable selectivity determined by completely content neutral factors such as lot, or first come first served or the like.[1] Rather, plaintiffs seek to become a part of governmental "public" broadcasting essentially as it

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1. Nor do plaintiffs claim that they were denied any right or privilege which the stations granted any other citizen similarly situated.

is, except they want it to broadcast this particular program of their choice, However, there is simply no way for them--together with all others who might wish to assert similar rights for their favorite "dramatization"--to become a part of such "conventional" (as distinguished from pure "open forum") governmental broadcasting except on the basis of governmental selection of the individual programs.

As the majority opinion convincingly demonstrates, in television broadcasting not only is selection inevitable, but it is likewise inevitable that in numerous instances it will be largely based on factors that are not content neutral and on considerations that involve sympathy for or hostility to the program's "message" on the part of the

party having the power of selection.[2] This is not to say that program selection influenced by "message" sympathy or hostility on the part of governmental television stations is a desirable phenomenon, or even one which is wholly consistent with the values underlying the First Amendment. But such a characteristic is part and parcel of the operation of the conventional (not pure "open for-

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2. In my view, the level at which a particular television programming decision is made, just as the question of whether it is made by failure to initially select or by cancellation, is relevant here only in the sense of possibly being evidentiary of whether the decision is made on the basis of sympathy for or hostility to the program message or for some similar "political" type reason. In the context of these governmental stations broadcasting to the general public, I do not think it is of constitutional significance that the "sympathy" or "politics" influencing the decision is that of the program director or the university public affairs director or the station board of directors, when all are acting as governmental personnel.

um") governmental television stations of which plaintiffs seek to avail themselves. They are not entitled to have a special exception made in their favor so that for this particular program they are entitled to make the selection and require that these conventionally operated governmental stations broadcast it.

In contrast to a pure "open forum" system where diverse individual members of the public (and perhaps third-party producers) in effect select the programs and may be considered the speakers, in conventional broadcasting the power of selection rests with the station (or party controlling it) and in substance it is the speaker. Where a governmental unit controls a conventionally operated station, it is the speaker and speaks either in its corporate capacity or as a kind of proxy for the full body of its citizens. In an isolated instance, to

grant an individual the right to require such a station to broadcast a particular program merely because the station rejected it for "political" type considerations, is, in effect, to force the governmental unit--in either its corporate or more general representative capacity--to speak in a certain way and to forego other speech it would have engaged in. To grant such a right on a consistent and thorough basis is to necessarily transform the station into one operated essentially on an "open forum" basis.

In the second place, plaintiffs do not assert that the stations in question have, on the basis of their agreement or disagreement with the different points of view involved or for similar "political" type reasons, structured their programming so that it constitutes a one-sided or slanted presentation of any matter of public concern, importance

or controversy, whether relevant to the "message" of plaintiffs' desired program or otherwise.[3] So far as any such matters are concerned, plaintiffs' complaint is made essentially in a vacuum--they claim that merely because on one particular occasion a "political" type decision was made not to air one specific program plaintiffs wished to see, they therefore have a right to a court order directing these conventionally operated governmental stations to promptly air this precise program. We have rejected this claim. This is not to say, however, that no private citizen has a right to question the programming of governmental

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3. And plaintiffs do not contend their particular (or some similar) program must be shown to fairly balance the presentation on this subject matter which the stations have improperly slanted by showing some other program or programs.

"public" television stations under any circumstances, or that the remedy of complaint to the F.C.C. will always be adequate.

A private citizen has no constitutional right to force a conventionally operated governmental "public" television station to enter with its broadcasting a particular propaganda war by showing a specific program selected by the citizen. Whether it is proper for such a governmental station to enter that kind of a war at all, or whether if it does so it may nevertheless present only one side while refusing, for reasons of a "political" nature, to broadcast any competing view, are questions of a different nature that are not now before us.

DONALD E. MUIR, H. JEFF BUTTRAM, and O. NAVARRO FAIRCLOTH,
Plaintiffs-Appellants,

v.

ALABAMA EDUCATIONAL TELEVISION COMMISSION; JACOB WALKER, etc., et al., Defendants-Appellees.

No. 80-7546.

United States Court of Appeals,
Fifth Circuit.
Unit B

Sept. 21, 1981.

Before MARKEY*, Chief Judge, HILL and THOMAS A. CLARK, Circuit Judges.

MARKEY, Chief Judge:

Appeal from a judgment of the United States District Court for the Northern District of Alabama refusing to order Alabama Educational Television Commission (AETC) to broadcast the program "Death of a Princess" and granting summary judgment for AETC. We affirm.

*Chief Judge of the U.S. Court of Customs and Patent Appeals, sitting by designation.

BACKGROUND

AETC decided not to broadcast "Death of a Princess", scheduled for broadcast in Alabama on May 12, 1980 at 8:00 p. m. The film, one of thirteen in the series "World," is a drama/documentary of events said to have surrounded the July 1977 public execution for adultery of a Saudi Arabian princess and her lover.

AETC, organized under Ala. Code § 16-7-1, is responsible for "making the benefits of educational television available to and promoting its use by inhabitants of Alabama" and has "the duty of controlling and supervising the use of channels reserved by the federal communications commission to Alabama for non-commercial, educational use". Ala.Code § 16-7-5.[1] To this end, AETC

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1 Footnote on following page.

operates a statewide network of nine non-commercial, educational television stations licensed by the Federal Communications Commission (FCC) under the Communications Act of 1934 (47 U.S.C. §§ 151, et seq.). AETC is funded through state

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1 (from preceding page)
The statutory provisions establishing AETC provide in pertinent part:

§ 16-7-1. Creation.

There is hereby created an agency to be known as the Alaabama educational television commission, hereinafter called the commission.

§ 16-7-5. Duties.

The commission is organized for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Alabama ... The commission is specifically charged with the duty of controlling and supervising the use of channels reserved by the federal communications commission to Alabama for non-commercial, educational use. It may ... make rules and regulations governing the operation of such stations and the programs televised over such channels.

legislative appropriations from the Special Education Trust Fund, matching federal grants through the Corporation for Public Broadcasting (CPB), and private contributions.

AETC is a member of the Public Broadcasting Service (PBS), a non-profit corporation distributing public, non-commercial television programs to its members by satellite.[2] AETC is also a member of the Station Program Cooperative (SPC), a program funding and acquisition mechanism operated by PBS. Membership in SPC entitles licensees to participate in the selection and funding of national public television programs distributed by PBS. Respecting each such program, member licensees indicate whether they will contribute to the costs of purchasing the broadcast

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2 PBS filed a brief Amicus Curiae in the district court and in this court.

rights. Those refusing to contribute to a program's cost are precluded from broadcasting that program. Those agreeing to contribute are free to broadcast or not to broadcast the program. PBS's "Station Users Agreement", reposing in licensees the absolute right to select programs they will broadcast and to determine when they will broadcast them, accords with an FCC requirement that its licensees exercise exclusive control over selection of material for broadcast.

PBS's acquisition of "World" was funded by 144 public television licensees, including AETC, through the SPC. During the week before its May 12 scheduled broadcast, the showing of "Death of a Princess" was protested by Alabama residents citing fear for the personal safety and well-being of Alabama citizens working in the Middle East. On May 10, AETC announced its decision not to broadcast the film

as scheduled.

Appellants, residents of Alabama who had planned to watch "Death of a Princess," brought this action on May 12, 1980 under the First and Fourteenth Amendments and 42 U.S.C. § 1983, seeking to compel AETC to broadcast the film and preliminary and permanent injunctions against AETC's making "political" decisions on programming.

In a well-reasoned opinion, Judge J. Foy Guin, Jr. explained (1) that the likelihood of success on the merits criterion for an injunction had not been shown; (2) that the First Amendment protects the right of broadcasters, private and public, to make programming decisions free of interference; and (3) that viewers have no First Amendment right of access to the Alabama educational television network sufficient to compel the showing of "Death of a Princess."

Accordingly, Judge Guin denied the motion for a mandatory order, denied a preliminary injunction, and granted summary judgement for AETC.

Issue

[1] Whether AETC's decision not to broadcast "Death of a Princess" violated Appellants' constitutional rights under the First and Fourteenth Amendments.[3]

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3. The parties concentrated their briefs and arguments on First Amendmant considerations and did not differentiate between the First and Fourteenth Amendments. In view of our holding and discussion, no useful purpose would be served by a detailed treatment of merely mentioned or potential arguments concerning primary FCC jurisdiction, a government speaker's right not to speak, due process elements in AETC's decision-making, federalism implications in federal court review of state-agency decisions, Appellants' standing, or prior restraint upon the film's producers who are not parties. Though
(continued on following page)

OPINION

Worthy but warring concepts are from the outset endemic when government acts not solely to govern but to fund and foster functions paralleling those conducted by its private citizens.[4]

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3. (continued from previous page)

Amicus PBS argues for our abstention in light of FCC's jurisdiction, resolution of conflict among the district courts of this circuit, see n. 21, and considerations of overall judicial economy, warrant treatment on the merits here. The text sets forth the basis for our agreement with the district court's conclusion that Appellants had not met the "likelihood of success on the merits" criterion for issuance of an injunction.

4. See, eg., Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (municipal operation of utility); Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) (state-approved price fixing among growers).

If, for example, the umpire sponsors a team, can the game's rules be applied equally to private and sponsored teams? Put another way, how may constitutional provisions designed to control the acts of those operating a government be applied to the acts of those operating a government sponsored television station? At the federal level, the pragmatic answer has been the adoption of legal and operational mechanisms limiting the federal government to a funding function and divorcing it from control over program content.[5]

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5. Whether "public" operation of communication media in a free society is wise, warranted, or workable is a matter within the province of the Congress, not the courts. It has not been shown to be unconstitutional. Of relatively recent vintage, operation of public television stations has grown in an atmosphere of continuous concern for avoidance of government control over program content. To date, "he who
(continued on next page)

Those mechanisms have thus far permitted identical treatment under the Constitution of private and public broadcasters.[6]

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5. (continued from previous page)

pays the fiddler" has not apparently "called the tune". From the grant of the first noncommercial-educational TV license in the late 1940's, to today's 285 educational and public television stations, a growing recognition of the pervasive power of television has been reflected in efforts to divorce federal support from federal control. Insulation of the fund-dispersing CPB from political control in 1967, the creation of PBS and its limitation to interconnection and program distribution in 1969, and the formation of SPC in 1974, reflect a consistent effort to insure that program content selection remains in the hands of local public television stations. See, Blakely, To Serve the Public Interest (1979); The Public Broadcasting Act of 1967, 47 U.S.C §§ 390-399; The Broadcast Industry (R. Stanley, ed. 1975); Public Television; A Program For Action, Report of the Commission on Educational Television, January, 1967.

6. The FCC requires that every broadcaster consistently maintain independent control over selection of programs as (continued on next page)

In a very real sense, the presentation of competing first amendment interests here reflects the influence of emphasis. AETC and Amicus PBS emphasize the First Amendment's protection of a free press, of which the lifeblood is editorial freedom. Appellants emphasize the First Amendment's protection of free speech and their derivative right

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6. (continued from previous page)

a condition to retention of a license. E.g., Cosmopolitan Broadcasting, 59 FCC 2d 558 (1976). 47 C.F.R. § 73.658(e), requires that every broadcaster reserve the right to reject any program offered to it. The FCC makes no distinction between private and public licensees, Mississippi Authority for Educational Television, 71 F.C.C.2d 1296 (1979), City of New York Municipal Broadcasting System, 56 F.C.C.2d 169 (1975). The right and duty of public broadcasters to choose their programs is clear also in the Public Broadcasting Act of 1967, § 396(a)(1)(B), and in its legislative history, S.Rep.No. 222, 90th Cong., 1st Sess. 7, 14. 15.

to hear.[7] The former, except in fairness doctrine cases, has to date prevailed with respect to all broadcasters. Whether it should prevail with respect to AETC in this case may be judged on whether the function challenged here was a governmental function.

Public and private broadcasters may be safely treated identically, in constitutional juriprudence, if their functions under review be essentially identical. A focus on function, rather than on ownership or funding source, leaves room for public and private broadcasters to operate. At the same time, a functional analysis would permit

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7. Appellants describe AETC throughout as "a government-owned television station". AETC describes itself as "a non-commercial broadcaster". PBS describes AETC as "a public broadcaster".

court enforcement of First Amendment protections in a case in which mere government ownership or funding had been metamorphosed into actual government contest control.

[2] The First Amendment is not a fetish. Revered it must be, but continued reverence requires that its applications be intelligible. A criterion for consistency is the recognition that the function to which the Amendment is applied may influence the result reached. If, for example the function be government censorship of a newspaper, the Amendment forbids it. If the function be, as Mr. Justice Holmes put it, a false cry of "Fire" in a crowded theatre, it is not protected. At the same time a myriad of functions -- speaking, book publishing, theatre presentations, pamphleteering, and others -- enjoy a proper presumption of protection under the First Amendment

In the present case, the challenged function of AETC, in deciding to cancel "Death of a Princess", is not unlike that routinely performed by private broadcasters. Because Appellants concede that function to private broadcasters, a functional analysis would appear to end the controversy at that point. Appellants' arguments, however, amount to a vigorous value-versus-value dichotomy deserving of response. Pointing to the presence of a state government as sponsor and partial source of funds for AETC, Appellants paint AETC as "government related" and its programming choices as "governmental action" and "governmental censorship".

Editorial Freedom v. Censorship

Among the conflict of concepts here is that between an asserted right

in Appellants as potential viewers to compel broadcast of "Death of a Princess" and an editorial freedom of AETC to independently select the programs it will broadcast. Solely because it is "owned" by a government Appellants say AETC is bound by First Amendment restrictions against governmental censorship. The application of constitutional principles cannot, however, be controlled by the bare and barren fact that government plays some role.

[3] Recognizing a unique role played by broadcast licensees in our jurisprudence, the Supreme Court has held that regulation of the broadcast media, because of its inherent physical limitations, presents "an unusual order of First Amendment values," Columbia Broadcasting System v. Democratic

National Committee, 412 U.S. 94, 101, 93 S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973), (hereafter CBS). See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). Broadcast frequencies are a scarce resource which must be parceled among applicants. Because all who desire to communicate cannot be satisfactorily accommodated, "it is idle to posit an unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Red Lion Broadcasting Co. v. FCC, supra at 388, 89 S.Ct. at 1806. Delicate indeed is the process of balancing First Amendment interests while determining what best serves the public's right to be informed, a process which must "necessarily be undertaken within

the framework of the regulatory scheme [the Communications Act]." CBS Supra 412 U.S. at 102, 93 S.Ct. at 2086.

[4] Under the Communications Act, both public and private broadcasters are licensed by the FCC to serve the public interest as public trustees. As such, each licensee has an obligation to perform a programming function responsive to the needs and interests of the community it serves and to insure that the public is presented suitable and varied social, political, and aesthetic ideas and experiences. As indicated above, the manner in which those obligated functions are discharged has to date been left to the editorial discretion of the licensee, whether public or private.

As Judge Guin noted, the Communications Act envisages the licensee as

having the absolute right and nondelegable responsibility to select the programs to be broadcast. CBS supra. AETC's decision to cancel the scheduled showing of "Death of a Princess" was thus an exercise of its obligation as a broadcast licensee to make its own programming decisions. If AETC had refrained from that exercise, it would have violated its statutory duty as a licensee.[8]

[5] If, however, continuation of a right in public broadcasters to select their programs would violate Appelants'

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8. AETC once lost its license in part because it failed to maintain exclusive authority over all of its programming decisions. Alabama Educational Television Commission, 50 F.C.C.2d 461, at 464 (1975).

constitutional rights, the former could not prevail solely because it is statutorily authorized. Neither broadcast licensees nor FCC may operate in a constitutional vacuum. Indeed, as Justice Stewart indicated in CBS, the First Amendment exists to protect the people from government, not vice-versa.[9] Hence, if government ownership and partial funding alone be synonymous with government censorship of program content, government ownership and funding would doubtless have to cease.

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9. The First Amendment does not, however, preclude the government from speaking, P.A.M. News Corp. v. Butz, 168 U.S. App.D.C. 376, 514 F.2d 272 (D.C.Cir. 1975), or from exercising editorial control over its own medium of expression. See, e.g., Wooley v. Maynard, 430 U.S. 705 at 717, 97 S.Ct. 1428 at 1436, 51 L.Ed.2d 752 (1977); Avins v. Rutgers, State University of New Jersey, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920, 88 S.Ct. 855, 19 L.Ed.2d 982 (1968); Advocates for the Arts v. Thomson, 532 F.2d 972 (1st Cir.), cert. denied, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976); Network Project v. Corporation for Public Broadcasting, 4 Med.L.Rptr.2399,2409 (D.D.C. 1979).

Public broadcasters, like private broadcasters, make decisions every day on which programs to broadcast. They do so not only as a matter of practical necessity but, as above indicated, in accord with their duty under the Communications Act. The inevitable result of the statutory scheme and the limited availability of broadcast time, is the licensee's rejection of some programs in favor of others. If initial rejection of some programs were considered a form of constitutionally forbidden censorship, every public television station would violate the Constitution with virtually every choice it made.

Whatever the programming choice made by a public broadcaster, our pluralistic society insures that unanimous public concurrence would be rare. It is true that the protections of the

First Amendment relate most solidly to speech likely to prove controversial, universally approved speech having no need of protection. Yet it is inconceivable that Appellants could complain that their constitutional rights would have been infringed if AETC had initially declined to participate in financing the "World" series. It would demean the First Amendment to find that it required a public referendum on every programming decision made every day by every public television station solely because the station is "owned" and partially funded by a state government. It would be equally Draconian to hold on that sole ground that the programming decisions of public broadcasters constitute government censorship, with the concomitant necessity of declaring that public

television stations exercising editorial freedom are themselves constitutionally prohibited.

[6] The present case originates at a point beyond the initial choice stages. AETC made the decisions to fund and accept the "World" series, to schedule "Death of a Princess" for showing on May 12, 1980, and to advertise that schedule. AETC then made a subsequent programming decision; it "changed its mind", and decided not to make the showing. Thus the issue on the present facts can be stated as whether a public television station may cancel an announced, scheduled program without violating the constitutional rights of viewers who were expecting to see it. In essence, appellants here assert a constitutional right to see every show appearing on a pre-announced schedule.

A decision to cancel a scheduled broadcast is obviously a programming decision, no less editorial in nature than the initial scheduling decision. No reason in fact or law appears for treating the former differently from the latter in this case. Whether applied to cancelling decisions or to initial scheduling decisions, court injunctions would implicate the same destruction of editorial freedom, the same excessive involvement of government and the courts in the editorial process, and the same impossibility of either editor or court pleasing an entire public.

Appellants' "censorship" argument is a recognition that the risk of reposing editorial freedom in government owned broadcasters lies in an obvious

potential for government control of program content, in a word, for government use of its non-commercial, educational television station to perform the function of propagandizing the public. It is useful, in this context, to be reminded of the facts before us.

Raising the spectre of government control cannot serve the ends of justice if employed as determinative in a case involving no such control. AETC is operated by a commission. There is no allegation or indication that the commission is functioning in any manner as a propaganda arm of the government of Alabama. Though AETC receives some of its funds from the state legislature, its present operation could not survive on those funds alone. The matching amounts from CPB, see note 5 supra, and those from the public, are isolated

from a "money talks" potential for controlling program content. There is no evidence here that the government of Alabama had anything whatever to do with AETC's decision.[10]

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10. In Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), the majority noted, 536 F.2d at 1075, that University authorities had nothing to do with a student editor's rejection of an ad submitted by the Alliance and upheld the free press right of editorial discretion. In an extended and scholarly dissent, Judge Goldberg viewed the editor's action as state action, pointed to the access provided to the student papers' advertising columns for ads from any source, and offered a reconciliation under which the content of sections devoted to news, editorial, guest columns, and letters could remain under editorial discretion, while access to space devoted to unedited advertisements and announcements would be accessible to all, subject to possible source and content-neutral limitations. Attractive as Judge Goldberg's reasoning is, we are denied its benefit here, where AETC has not opened its facilities to the public, for ads, announcements, or otherwise, and appellants are not seeking to present their ads, announcements, or views, but are merely seeking to force AETC to present a show they want to see.

In sum, the present record reflects no basis for fear that the government of Alabama is "really operating the electronic press". CBS, 412 U.S. at 143, 93 S.Ct. at 2106.[11]

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11. The concerns expressed in CBS by Justice Douglas, at 412 U.S. 149, 93 S.Ct. at 2109, and Justice Stewart at 412 U.S. 143, 93 S.Ct. at 2106, about "the Government" were directed toward the presence of a federal regulatory agency, the FCC. If public broadcasting stations were considered "the government", solely because they are "owned" and partially funded by state governments, and the statements of concern in CBS were so applied as to enable any citizen to compel the showing of any program the citizen desired to see, public broadcasters could be precluded from making any choice of programs, which may in practice equate to forbidding their existence. In applying the First Amendment, we make no distinction between state and federal governments. The record does not establish, however, that AETC is an "agency" of either government, or that its programming decisions were in fact decisions of either government. It is unnecessary to determine, therefore, whether AETC must either operate as a public forum or cease operating.

[7] The district court found that AETC elected not to broadcast "Death of a Princess" because it believed the showing posed a direct threat to the well-being of Alabama citizens in the Middle East, that is, that the showing would be contrary to the "public interest." Appellants have not shown that finding to have been erroneous. Nor have they shown error in the finding that AETC's decision was independently made by the commission itself, and did not result from importunings of any government.

It is useful also to note that Appellants here are asserting rights as viewers desiring to see a scheduled film, thus seeking to force an unwilling speaker to speak. They are not seeking relief from a prior restraint of their own right to speak. Nor are they

asserting that the film is a one-sided presentation of, or deals in any manner with, a controversial issue before the public. If appellants were asserting that the challenged decision dealt with issues of public importance, their claim would be under the fairness doctrine and would have to be lodged with the FCC, which has developed procedures amenable to accommodation of First Amendment conflicts under the doctrine. See American Security Council Education Foundation v. FCC, 197 U.S. App.D.C. 124, 607 F.2d 438 (1979) (en banc), cert. denied, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980). Respecting conflict between the right to hear and the right not to speak, even when government has the information sought, see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct.

1817, 48 L.Ed.2d 346 (1976), and Houchins v. KQED, Inc. 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978).

[8] That a "public" television station is "owned" by a state government may be cause for concern, for vigilance with vigor, for seeking of safeguards. It may raise a possibility, even an opportunity, for government censorship. It is not itself censorship. Nor is it alone a talisman for application of First Amendment principles different from those applied to private broadcasters. Hence the naked fact of government ownership, from which appellants leap to the conclusion that every program rejection constitutes government censorship, is insufficient in itself to require denial of editorial freedom in this case to public broadcasters.

Editorial Freedom v. Public Forum/Public Access

That the First Amendment protects the right of private broadcasters, subject to the fairness doctrine, to make programming decisions free of interference and public access was made clear by the Supreme Court in CBS, supra. In upholding the right of a private broadcast licensee to refuse editorial advertisements, the Court said:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors -- newspaper or broadcast -- can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a

> spirit of moderation and a sense of responsibility -- and civility -- on the part of those who exercise the guaranteed freedoms of expression.

CBS, supra 412 U.S. at 124-125, 93 S.Ct. at 2097.[12]

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12. Both parties quote segments of one or more of the six opinions supplied by the court in CBS. The quoted segments, standing alone, appear to support the position of the quoting party. From the six opinions, it is difficult to glean from any one in its entirety a majority view on all the issues. Though a majority clearly concluded that private broadcaster CBS did not violate the Constitution in refusing the proffered advertising, the opinions contain varied comments respecting the relationship of a broadcasting facility to "the Government". In one opinion, CBS's decision was viewed as not constituting "governmental action", its refusal to accept the advertisements, "assuming governmental action", was held not violative of the First Amendment, and journalistic independence was described as incapable of existence if CBS's refusal were read as governmental action. In two concurring opinions it was pointed out that to read broadcaster action as governmental action would be to render broadcast stations public forums and (continued on next page)

[9] The First Amendment right set forth in CBS has been held to reside equally in non-commercial public licensees, such as AETC, who do not forfeit that right merely because they are publicly supported. Community Service Broadcasting v. FCC, 593 F.2d 1102 (D.C. Cir. 1978).[13]

(Continued from previous page)
strip them of their First Admendment rights. The dissent argued that CBS should be considered a public forum. No specific reference to noncommercial public broadcasters like AETC appears in the opinion accompanying the Court's decision in CBS.

13. [N]oncommercial licensees are fully protected by the First Amendment. Clearly, the existence of public support does not render the licenses vulnerable to interference by the federal government without regard to or restraint by the First Amendment .... non-commercial broadcasters no less than their commercial counter-parts are entitled to invoke the protection of the First Amendment .... 593 F.2d at 1119.

Thus AETC's refusal to broadcast "Death of a Princess" is itself constitutionally protected.

[10] Nothing of record indicates that AETC must be considered a public forum to which Appellants have a constitutional right of access or in which Appellants have a constitutional right to compel the broadcast of "Death of a Princess." That the government "owns" or financially supports a speech medium does not alone create a public right to force that medium to present a particular film. See Avins v. Rutgers, State University of New Jersey, 385 F.2d 151 (3rd Cir. 1967), cert. denied, 390 U.S. 920, 88 S.Ct. 855, 19 L.Ed.2d 982 (1968), and Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976), cert. denied, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed. 2d 177 (1976). It is only when the government has created a public forum dedicated

to public use that a right of access may obtain. The Supreme Court has recognized that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." Lehman v. Shaker Heights, 418 U.S. 298, 302, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974).

More recently, in upholding a statute prohibiting use of residential mail boxes for dissemination of unstamped literature, the Court cited its earlier recognition that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government". United States Postal Service v. Council of Greenburg

Civic Associations, __ U.S. __, ___, 101 S.Ct. 2676, 2685, 69 L.Ed. 2d 517 (1981). That recognition appears in Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966), Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119,97 Ct. 2532, 53 L.Ed.2d 629 (1977), and Lehman v. City of Shaker Heights, supra. Though none of the facilities involved in the cited cases was a public broadcast station, the principle for which the cases stand, namely that government ownership or control does not alone guarantee public access, is unaffected by that circumstance. Moreover, the Court pointed out, at ___ U.S. at ___ n.6, 101 S.Ct. at 2685 N.6, that use of an instrumentality

for communication of ideas or information does not alone require that the instrumentality be declared a public forum, citing the presence of such use in Lehman.

The Court in CBS concluded that a right of public access was fundamentally inconsistent with the responsibilities imposed on broadcasters to serve the public interest,[14] and that a public

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14. "The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. The public interest would no longer be 'paramount' but, rather, subordinate to private whim." CBS, supra 412 U.S. at 124, 93 S.Ct. at 2097.

right to demand that particular programs be broadcast would result in excessive and undesirable governmental intrusion.[15]

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15. Under a constitutionally commanded and Government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the [FCC] would be required to oversee far more of the day-to-day operations of braodcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of ...
The [FCC's] responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when." CBS, supra at 126, 127, 93 S.Ct. at 2098, 2099.

In FCC v. Midwest Video Corp., 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979), the Court again stated that public access would conflict with the independence of individual licensees.[16] We can see no basis for abandoning or evading those conclusions with respect to public broadcasters, to the functioning of which those conclusions apply with equal force. Indeed, the radical therapy of

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16. The language of § 3(h) [of the Communications Act] is unequivocal; it stipulates that broadcasters shall not be treated as common carriers.... [Section] 3(h), consistent with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the [FCC] to impose access requirements amounting to common carrier obligations on broadcast systems. The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. 440 U.S. at 705, 99 S.Ct. at 1444.

regimentation foreseen as accompanying access in CBS, 412 U.S. at 124, 93 S.Ct. at 2097, would be no less radical when applied to public broadcasters.

That the functioning of a broadcast station is fundamentally inconsistent with the concept of a public forum which must be open to all distinguishes this case from Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), on which Appellants rely.[17] There the

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17. Appellants also cite Mink v. Station WHAR, 59 FCC2d 987 (1976), wherein the FCC ordered a West Virginia radio station to file a plan stating how it would comply with the "fairness doctrine" by broadcasting programs related to strip mining. The fairness doctrine, codified in part at 47 U.S.C. § 315(a), imposes on broadcasters a duty to fairly reflect opposing viewpoints on public issues. That the FCC may, consistent with the First Amendment, limit the editorial discretion of its licensees by imposing
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Court held that a municipal auditorium could not preclude the showing of the musical "Hair" because it found that that the auditorium was a public forum dedicated to the public use as a "community center ... where civic, educational, religious, patriotic and charitable organizations ... may have a common meeting place." Id. at 549, n.4, 95 S.Ct. at 1242, n.4. There is an essential difference between a public broadcaster engaged in the private broadcaster function of selecting and presenting its own programs, and a municipal auditorium

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17. a fairness doctrine was recognized in Red Lion Broadcasting Co. v. FCC. supra. Mink stands for no more than' that and does not support the action plaintiffs would have the court take here, where the fairness doctrine is not involved.

Made available for presentations by others.[18]

In Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972), another municipal auditorium case, this court said the "crucial query" was whether the involved "public facility" was "an appropriate place for the exercise of First Amendment rights", Id. at 1019, and gave as factors to consider the character and activity of the

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18. The nature of facilities held to constitute public forums may be gleaned from the cases: bus terminals, Wolin v. Port of New York Authority; 392 F.2d 83 (2d Cir. 1968) cert. denied, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968); airports, Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975), cert. denied, 421 U.S. 992, 95 S. Ct. 1999, 44 L.Ed.2d 483 (1975); high school auditoriums, National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973); public libraries, Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); shopping centers, Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 88 S. Ct. 1601, 20 L.Ed.2d 603 (1968; and welfare offices, Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 (2d Cir. 197

place, its essential purpose, and the population who use it. AETC is an appropriate place for the exercise of First Amendment rights. The issue here is "whose?" The character and activity of AETC, and its essential purpose, make clear that it is a place for exercise of the editorial function, that is, of AETC's free press right set forth in the Amendment. Except as viewers, no population uses AETC. Appellants seek, by demanding access, to create a population of users, a goal inconsistent with continued exercise by AETC of its First Amendment rights.

Appellants' insistence that public television stations be judicially declared public forums sounds a tone of tour de force. Unlike public parks, bus terminals, airports, public libraries, shopping centers, and municipal auditoriums, public broadcast stations do not function and

have not functioned as public access places. Appellants distinguish other, non-public forums but government owned places like a judge's chambers, courtrooms, and the U.S. Senate, from public broadcast stations on the ground that the latter are "speech related". See CBS, supra, 412 U.S. at 194-195, 93 S.Ct. at 2132-2133 (Justice Brennan dissenting); United States Postal Service, supra, ___U.S. at___, 101 S.Ct. at 2688 (Justice Brennan concurring). As above indicated, that a public broadcast station is speech related and used for communications of ideas and information does not alone create a constitutional right in viewers to dictate program choices of public broadcasters solely because a state government "owns" the station, where the station has not been shown to be suitable for such dictation or to have been

dedicated and used for expression of individual views. See Cass, First Amendment Access to Government Facilities, 65 Va.L.Rev. 1287 (1979.

Respecting program selection, the public forum argument presents the question "Who shall decide?" Converting public broadcasters into public forums may be a "good idea". Absent a constitutional imperative it is not for us to effectuate. In apparent recognition that chaos could accompany unlimited public access, Appellants would grant public television stations the right to impose what Appellants describe only as "reasonable limitations as to time, manner, and place". It is clearly feasible to design and impose such limitations with respect to some public forums.[19]

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19. See Judge Goldberg's reconcilliation recommendations in Mississippi Gay Alliance,
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Appellants make no suggestion, however, as to how we might impose such limitations on the unique function of broadcasting. Appellants do not tell us how many citizens would demand shows they want to see, and do not say which or how many hours per week would be adequate to meet that demand. Nor are we told whether any room should exist for AETC's own programs if demand for access exceeded the system's capacity; nor whether any AETC selection of its own programs, during any non-access time, would constitute censorship

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19. supra note 9, and the discussions of public forums in the cases listed in note 18 supra. With sufficient channels and technical equipment available, some cable TV operators have voluntarily provided public access channels and two-way communication capacity.

of programs rejected. No suggestions appear respecting the manner of acquiring access, whether it should be "first come, first served", whether AETC should have any right to preview access programs, whether AETC could refuse to broadcast an access program it considered obscene or duplicative or otherwise not in the public interest, or whether the state would defend AETC's commission in suits based on their having allowed this or refused that access program. No suggestion is made regarding AETC's retention of its license after its violation of FCC regulations requiring it to exercise its own editorial judgment. That incomplete list of access parameters in broadcasting is sufficient to indicate the inappropriateness of a conversion of public broadcasting stations into public access places by judicial fiat in this case.

Editorial Freedom v. Basis of Choice

Appellants, contending that if AETC has freedom to make editorial decisions those decisions must not be political, argue that AETC's decision not to broadcast "Death of a Princess" was based solely on political considerations, an act of political censorship in violation of the First Amendment.

The editorial process is inherently subjective. To posit a general proscription against "political" programming decisions would vacate the statutory obligation of broadcasters to "cover" political events and public affairs. Further, it would necessarily involve unacceptable and undesirable judicial intrusion into the editorial process. A decision appearing to some persons as serving the "public interest" may well appear to

others as "political".[20] To force broadcasters, in making their required public interest determinations, to consider whether each could be justified in a court of law, would be inconsistent with the entire statutory scheme. Similarly, if viewers, whose perceptions and perspectives necessarily differ, could challenge programming decisions on such basis courts would be repeatedly called upon to enter an anti-free press quagmire, where they would then attempt to determine whether "political" considerations were present in programming

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20. Public television is assertedly watched by more than half the nation's viewers every week. Letters, The Washington Post, A18, June 6, 1981

decision after programming decision. Such a result is not only undesirable, it is constitutionally prohibited. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed. 2d 730 (1974).

Whatever may be said of a general proscription, the district court's finding in this case that AETC's decision was based on its view of the public interest, namely a concern for safety of Alabama citizens in the Middle East has not, as above indicated, been shown to have been clearly erroneous. Coupled with a total absence of importuning of AETC by government officials, that finding defeats plaintiffs' argument concerning the basis for the challenged decision.[21]

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21. Appellants attack the reality of AETC's
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A grant of Appellants' demand for an order compelling AETC to show "Death of a Princess" would on the present record constitute an unwarranted judicial foray into an area in which editorial not legal

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21. expressed concern, pointing to post-decision indications that Alabama citizens in the Middle East might not have been endangered. If there were error as to the facts underlying an editorial decision, it would not render that decision "political". A mere conjecture (that AETC's decision may have been a "political" effort to please the Saudi Arabian government) cannot form a basis for the mandatory injunction sought. The commission received protests within a week of the scheduled May 12 broadcast. The commission itself made the cancelling decision on May 10, on the basis of information then available. Plaintiffs' argument that Alabama should establish and publish editorial policies and an editorial decisionmaking procedure should be addressed to the Alabama legislature. Absent a violation of the Constitution, courts should refrain from imposing a bond of judicial oversight. But see Canby, "The First Amendment and the State as Editor; Implications for Public Broadcasting". 52 Tex. L.Rev. 1123 (1974).

judgments are required.[22] In CBS, the Supreme Court stated that the right of viewers is paramount, 412 U.S. at 102, 93 S.Ct. at 2086, but went on to state that governmental power will be asserted "only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters," Id. at 110, 93 S.Ct. at 2090, and that the access there sought would subject the public interest in coverage of public issues to "private whim". Id. at

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22. No court has granted a final order compelling a broadcast on the basis here sought. In Barnstone v. University of Houston, 487 F.Supp. 1347 (S.D. Texas, 1980) the court ordered a public broadcast station, KUHT-TV, to broadcast "Death of a Princess". On emergency appeal, this court vacated the order. Mr. Justice Powell denied a request to vacate this court's order and reinstate that of the district court. Barnstone v. University of Houston, 446 U.S. 1318, 100 S.Ct. 2144, 64 L.Ed. 2d 488 (1980)

124, 93 S.Ct. at 2097. The Court was there dealing with a private broadcaster and the effort to require CBS to broadcast a supplicant's own editorial advertisement. Yet the hierarchy of interests it expressed is even more applicable here, where appellants seek to force the showing of someone else's film they want to see. Appellants have not shown that the public interest would be served by a holding that the paramount right of viewers requires judicial intervention to order broadcast of a program desired by some viewers and protested by other viewers. On the contrary, and absent such a showing, the public interest would appear to lie in leaving undisturbed the present modus operandi, in which responsibility and accountability for editorial decisions are reposed with those best positioned and qualified to

make those decisions, the licensed broadcasters operating within the boundaries of the Communications Act and the fairness doctrine.

If there be logic in the law, and if a person could use the courts to compel the broadcast of a program solely because that person desired to see it, as Judge Guin pointed out, another person could use the courts to enjoin the broadcast of that program solely because that person considered it objectionable. The latter, a prior restraint so founded, would be constitutionally impermissible. It should be remembered that in broadcasting every compulsion carries constraint every compelled program necessarily replacing and thus restraining the program that would otherwise have been

chosen.[23] Courts are not equipped, staffed, or trained to meet the public interest by choosing among the programming interest to be served. Converting courts into super-editors, in derogation

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23. The concern over the free speech relationship of prior restraint and prior compulsion is not mentioned in Appellants' briefs. In support of the concept that courts may grant the order sought (which Appellants described as enforcing a First Amendment prohibition of "censorship" against public broadcasters) Appellants cite Southeastern Promotions v. Conrad, 402 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 228 (1968) (state law against teaching Darwinian theory), and Network Project v. Corporation for Public Broadcasting, 561 F.2d 963 (D.C.Cir. 1977) (suit against CPB and presidential aids, alleging censorship of PBS). The cases cited are clearly distinguishable on their facts. Appellants do not explain why, if their views on the compulsive power of courts against public broadcasters, and on public access to AETC's facilities, were adopted, a court would not have been required to consider an injunction against a showing of "Death of a Princess" if the protesters here had gone to court instead of to AETC. Appellants' briefs are replete with fairness doctrine parlance, though Appellants are apparently aware of the inapplicability of that doctrine in this case.

of the press freedom guaranteed by the First Amendment, would be not only unprecedented, unwise, and unwelcome; it would be unconstitutional.

Moreover, the breadth of judicial intervention here sought is unnecessary. Public broadcasters do not operate unseen. They are dependent on public support, and must meet their obligations as licensees under the Act. As the Court said in CBS, "Every licensee is already held accountable for the totality of its performance of public interest obligations." (emphasis added). 412 U.S. at 121, 93 S.Ct. at 2095.

Alternate Forum

Though we decline to replace AETC's editorial discretion with our own, or with Appellants', a forum does exist for consideration of Appellants' grievances.

Our election not to dismiss or stay the appeal in response to Amicus PBS's assertion of primary FCC jurisdiction, supra note 3, reflects no denigration of that forum and not suggestion that complaints similar to Appellants' should not in future be directed there.

Under the Communications Act, broadcast licenses are renewable every three years, at which time the FCC must review the licensee's overall performance to determine whether "the public interest, convenience and necessity would be served" by renewal. Provision is made for public participation. 47 U.S.C. § 309. Additionally, the FCC may at any time, upon public complaint or sua sponte, review the programming selections of its licensees to ascertain whether they are complying with the requirements of the Communications Act. § 308(b).

Indeed, FCC routinely reviews claims of the type pressed upon us, namely that programming judgments had been made improperly, deceptively, or in bad faith. See, e. g., KMAP, Inc., 72 F.C.C.2d 241 (1979) (suppression of news concerning United Farm Workers Movement); Right to Life of Louisville, Inc., 59 F.C.C.2d 1103 (1976) (refusal to broadcast photographs of live fetuses in womb); RKO General, Inc., 46 F.C.C.2d 240 (1974) (failure to air program about Passover); Representative Patsy Mink (WHAR), 59 F.C.C.2d 987 (1976) (failure to broadcast strip mining program); William Harsha, 31 F.C.C.2d 847 (1971) (refusal to allow George Jessel's criticism of "The New York Times" and "The Washington Post"); Mrs. Alexandra Mark, 34 F.C.C.2d 434 (1974), Aff'd, Mark v. FCC, 468

F.2d 266 (1st Cir. 1972) (refusal to allow comments concerning astrology and astrological sign reading); Citizens Communications Center, 25 F.C.C.2d 705 (1970) (refusal to air intimate scene between Black and White actors); Letter to Richard L. Ottinger, 31 F.C.C.2d 852 (1970) (editing of remarks on Chicago conspiracy trial); Gross Telecasting, Inc., 14 F.C.C.2d 239 (1968) (news slant-for private interests of licensee); Tri-State Broadcasting Co., Inc., 59 F.C.C. 2d 1240 (1976) (alleged news distortion to promote interests of advertisers); Public Communications, Inc. 49 F.C.C. 2d 83 (1974) (deletion of reference to product in entertainer's monologue); Screen Gems Stations, Inc., 46 F.C.C.2d 252 (1974), Recon. denied, 51 F.C.C.2d

557 (1975) (broadcast of Sugar Bowl would be contrary to public interest because the game discriminates against Blacks); Columbia Broadcasting System (Mobile Homes), 43 F.C.C.2d 1266 (1973) ("60 Minutes" segment on mobile homes failed to disclose CBS's interest in a Florida development); Mark Lane, 37 F.C.C.2d 630 (1972) (deletion of remarks in discussion of Viet Nam War); National Broadcasting Company (Chet Huntley), 14 F.C.C.2d 713 (1968) (Chet Huntley commentary re: Wholesome Meat Act of 1967 failed to disclose his ranching interests); Station KTYM (Anti-Defamation League), 4 F.C.C.2d 190 (1966) aff'd, 403 F.2d 169 (D.C.Cir.) 1968), cert. denied, 394 U.S. 930, 89 S.Ct. 1190, 22 L.Ed.2d 459 (1969) (broadcast of allegedly

anti-Semitic remarks); Bernard Hanft, 14 F.C.C.2d 364 (1968) (failure to cover department store picketing); Columbia Broadcasting System (WBBM-TV), 18 F.C.C.2d 124 (1969) (allegation that "pot party" documentary was staged by broadcaster); Columbia Broadcasting System (Poor People's Campaign), 17 P & F Rad. Red.2d 843 (1969) (coverage of Poor People's Campaign allegedly slanted and staged); Radio Station WSNT, Inc. 27 F.C.C.2d 993 (1971) (failure to cover Black organization's activities); Time-Life Broadcast, Inc. (KOGO-TV) 33 F.C.C 2d, 1050 (1972) (allegations of "Anglo bias" in the news); Hunger in America, 20 F.C.C.2d 1050 (1972) (allegations of "Anglo bias" in the news); Hunger in America, 20 F.C.C.2d 1050 (1972) (allegations of "Anglo bias" in the news);

Hunger in America, 20 F.C.C.2d 143 (1969) (documentary allegedly misleading and staged); Lincoln County Broadcasters, Inc., 51 F.C.C.2d 65 (1975) (broadcast critical of zoning decision for political reasons). Congress has armed the Commission with an arsenal of remedies for correction of programming misjudgments without resorting to censorship. Among the remedies employed in the cited cases are: admonishment of licensees for irresponsible programming judgments; imposition of a forfeiture for programming inconsistent with the public interest; declaration that licensee has failed to comply with FCC policies; issuance of a "short term" renewal; designation of license renewal application for full evidentiary hearing; and denial of license renewal. With the

expertise thus developed by the FCC, and with its many available remedies, including the ultimate weapon of license denial, no reason appears for subjecting the crowded dockets of the courts in the first instance with the myriad of complaints reflected in the cited cases. Jamming the courthouse door with such claims can only serve to delay or deny access to the courts by those who must seek their aid.

Casting a claim in constitutional terms does not automatically render the FCC an inappropriate forum to consider it. As above indicated, FCC's procedures in responding to claims that a licensee is obligated to present a particular program fully recognize and accommodate competing First Amendment interests. See American Security Council Education Foundation v. FCC, supra.

The Supreme Court has described the Communications Act as "drawn from the First Amendment itself" and has pointed out that "the public interest standard necessarily invites reference to First Amendment principles." CBS, supra, 412 U.S. at 122, 93 S.Ct., at 2096.

Conclusion

ACTC's refusal to broadcast "Death of a Princess" was a legitimate exercise of its statutory authority as a broadcast licensee to make its own programming decisions and is protected by the First Amendment guarantee of freedom of the press. That AETC is publicly-funded, or may be described as "government owned", does not alter that result in this case. Because Appellants have no constitutional right to compel AETC to broadcast "Death of a Princess," the district court properly

awarded summary judgment to AETC.

AFFIRMED.

THOMAS A. CLARK, Circuit Judge, dissenting:

The majority's opinion is fatally flawed by its failure to recognize the constitutionally mandated differences in the scope of editorial discretion of public and private broadcasters. In the present case, contrary to the majority's view, there is state action that censors a particular viewpoint. I would hold that when a public broadcaster cancels a scheduled program on the basis of the program's content, unless the procedural guidelines established in Freedman v. Maryland[1] are

1. 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

followed, the state commits an act of censorship that runs afoul of the First and Fourteenth Amendments. In the instant case, the majority condones censorship by a state-government agency. By permitting the State of Alabama to deny a public viewing of a controversial program, our court swims against a stream of precedent and a philosophy that goes to the roots of one of our most cherished freedoms.

The most elaborate discussion of First Amendment rights as applied to television is found in CBS v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080,36 L.Ed.2d 772 (1973). It must be remembered that the broadcasting medium involved in that case was privately owned, not governmentally operated and controlled. The following two excerpts

from the opinion of Chief Justice Burger provide the backdrop for my concern about the majority opinion:

> Although the broadcaster is not without protection under the First Amendment, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166, 68 S.Ct. 915, 933, 92 L.Ed. 1260 (1948), "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount ... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." Red Lion, supra, [395 U.S. 367] at 390, 89 S.Ct. [1974] at 1806 [23 L.Ed.2d 371].

CBS v. Democratic National Committee, 412 U.S. at 101, 93 S.Ct. at 2086 (emphasis supplied). The Chief Justice, in referring to the beginning of governmental regulation of the broadcasting industry, quotes the following statement given by then Secretary of Commerce

Herbert Hoover in testimony before a House committee:

> "We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material." Hearings on H.R. 7357 before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess., 8 (1924).

CBS v. Democratic National Committee, 412 U.S. at 104, 93 S. Ct. at 2087.

The vision of the majority is obscured, in my opinion, in two respects. First, the majority believes that the editorial discretion that may be exercised by this state-controlled broadcast network is as constitutionally broad as that enjoyed by a private licensee. Second, building on that premise, the majority then concludes that

no constitutional difference exists between the decision to broadcast and the decision to cancel, and that whatever the character of the decision challenged here, it does not raise a constitutional issue.[2] My own view is that whenever a state agency supervises broadcast programming, even when it holds the broadcast license, it may not discriminate between points of view on issues of public controversy.

To begin with, state action is present in the decision of the Alabama Educational Television Commission (AETC). The licensee is a creature of the State of Alabama, not the FCC, and is run by persons holding public office under Alabama law.[3] For me the answer to the

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2. I also confess to some difficulty in understanding how a state-controlled broadcast network, at least with respect to claims of discriminatory access, is not in any sense a public forum.

3. Ala.Code §§ 16-7-1 to -5 (1975).

question of state action is no different in this case than it would be if the the licensee were alleged to have engaged in a systematic censorship of all views aired under its auspices that were, for instance, contrary to those of the policical party of a controlling majority of the members of the Commission. If such were the allegations here, the plaintiffs would not have to wait idly by while the FCC, in a lengthy hearing procedure, decided whether such conduct was consistent with a public broadcaster's obligations. Seciton 1983 would reach the actions ofthese persons acting under color of state law. It does so here.[4]

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4. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973), upon which the majority so heavily relies, does not support today's decision. In that case only three justices
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were of the view that the actions of private network broadcasters were insufficiently attributable to the government for the First Amendment to apply (Burger, C.J., joined by Stewart and Rehnquist, JJ., 412 U.S. at 114-21, 93 S.Ct. at 2092-96). Three justices were of the view that, assuming the broadcasters' actions were attributable to government through licensing and regulation by the FCC, the policy of private broadcasters of denying paid political ads on demand did not violate the First Amendment. (White, J., and Blackmun, Powell, JJ., concurring, 412 U.S. at 146-48, 93 S.Ct. at 2108-09.) Those justices accepted the FCC's determination, and Congress' through its enabling legislation, that alternative formats would suffice to keep what was assumed to be a government function content neutral. Two Justices (Brennan and Marshall, JJ., 412 U.S. at 170, 93 S.Ct. at 2120) were of the view that the private broadcasters' actions were comparable to those of the government that regulated them, and that the fairness doctrine was a constitutionally inadequate substitute for the right of access asserted. No one can read the whole of the decision, however, and find any support, express or implied, for a broadcaster's content-based editorializing that is dictated by a state agency. That problem simply was not present. In that case, as the majority concluded, the question was "not whether there is to be discussion of controversial issues of public

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In dissenting, I limit my views to the facts of this case. AETC had purchased "Death of a Princess" as part of a package distributed through the Station Program Cooperative (SPC). As a member of SPC, the AETC had participated in the editorial decision to program "Death of a Princess" and had contributed to the funding of its broadcast by the Public Broadcasting System. As pointed out by the majority, AETC had the right to refrain from showing the program, notwithstanding its participation in the selection and funding of the program. It is that contractual right coupled with what the majority

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importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when." 412 U.S. 130, 93 S.Ct. at 2100. The majority would have the reader believe

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describes as the editorial freedom to choose its own programs that permitted AETC in this instance to cancel the showing of "Death of a Princess" two days before its scheduled broadcast. Remember that the decision by AETC not to show this controversial program was not grounded upon a reasonable judgment that a substitute program better fitted the needs of the television viewers.[5]

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that that is the issue here as well. But the issue here is whether a state agency may determine that there will be no discussion of a controversial issue of public importance by licenses subject to its control.

5. Nor was the decision based on any conclusion that the program's manner of presentation was in any way unfair, unbalanced, or non-objective, notwithstanding the difficulty of a judicial evaluation of such a defense. Instead the decision was based solely on its content as viewed by others. In effect, Alabama had supplied a surrogate censor for the Saudi regime.

The decision made by AETC was to censor this particular episode in the World series, a decision to deny the public a viewing of what the Commission assumed to be a sensitive program. To make a conscious decision to prevent the public from viewing or hearing a program and to select a "filler" as a substitute merely to consume the time initially allocated for the deleted program plainly amounts to a "prior restraint."

The majority melds its erroneous construction of the facts with its misinterpretation of the law when it concluded that a state broadcaster's decision to cancel a program is conceptually indistinguishable from the most mundane programming decisions:

> A decision to cancel a scheduled broadcast is obviously a programming decision, no less editorial in nature than the initial scheduling decisions, court injunctions would implicate the same destruction of editorial freedom, the same excessive involvement of government and the courts in the editorial process, and the same impossibility of either editor or court pleasing an entire public.

Majority opinion, page 1018. This reasoning simply is not convincing to me. The decision to schedule a program is a completely different animal from a subsequent decision to cancel it, if the decision to cancel has any element of official censorship. Censorship is a conscious decision to exclude the public from exposure to facts or opinions because the governmental decisionmaker deems such exposure harmful.

With respect to governmental operation of television or any other media form, the scope of editorial freedom must differ from that accorded the private media. The freedom of the private media cannot be abridged by the government. When the government operates a form of the media, however, it is not free to pick and choose between

views on issues of public controversy. For the limited purposes required by the facts of this case, I would hold that once a program is selected for viewing in the manner done here, it cannot be replaced by action of a state agency unless the decision is made for reasons unrelated to the content of the program replaced. The power of censorship -- the power to prohibit the public from knowing or seeing -- in its slightest form should be denied to a state broadcaster.

The decision to cancel a program once it has been chosen for broadcast, as under these facts, should be subject to all the protections enjoyed by presumptively protected speech.

The settled rule is that a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to

obviate the dangers of a censorship system." Freedman v. Maryland, 380 U.S. 5., 58, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 (1965). In Freedman the Court struck down a state scheme for the licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58, 85 S.Ct. at 739. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor.

second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559-60, 95 S.Ct. 1239, 1247, 43 L.Ed. 2d 448 (1975) (Citations omitted). Through this process, a state broadcaster is given ample opportunity to demonstrate that a program's content is not protected speech.

The majority wrongly views the instant case as being one largely involving the right of access to a public forum. A public forum is not merely a place where anyone can go and, subject only to reasonable time, place, and manner restrictions, express any

protected speech (although most places that have been regarded as public forums to date have that characteristic in common). Instead, it is at least any facility maintained or regulated by government that is "designed for and dedicated to expressive activities." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555, 95 S.Ct. 1239, 1245, 43 L.Ed. 2d 448 (1975). Only the highly varying characteristics of differing media (in Southeastern Promotions a municipal auditorium, while here a broadcasting network) render them distinguishable on the basis of any claimed rights of access. But this is no "right of access case," as the majority characterizes it; it is a discriminatory-access case. We need not decide, and I do not suggest, that a state-controlled broadcast

network's status as a public forum gives rise to any affirmative right of access on the part of those interested in airing their own views by means of that forum. However, I think we must decide that a regulatory agency cannot selectively deny all access to discussion of an issue of public controversy except with regard to the time, place, or manner limitations of the forum itself. Even then, the agency may not consistently exclude one side of public controversy unless the message has already been given sufficient coverage through other means. A Government broadcaster's editorial discretion must be, to the greatest extent possible, content-neutral. This cancellation flowed directly from a state agency's determination that the content of this program was unacceptable.

I would prefer that the government not be in control of any form of the media. That decision is not left to me. Other members of the court and I are left with the responsibility of insuring that government's use of the media does not play favorites on issues of controversy. Besides the possible fear -- like that of any people -- is that of oppression by our own government. The framework of our government was designed by our founders to protect us from government. AETC's casual disdain for our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[6] although no doubt accompanied

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6. New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721 11 L.Ed.2d 686 (1964)

by sincere motive and infrequent occurrence, is no less repugnant to the Constitution than a studied design of thought control. I therefore dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED: July 3, 1980

DONALD E. MUIR, H. JEFF BUTTRAM, and O. NAVARRO FAIRCLOTH, Plaintiffs,	)	
v.	)	
ALABAMA EDUCATIONAL TELEVISION COMMISSION; JACOB WALKER, MRS. JERRI McLAIN, MRS. BERTHA S. ROBERTS, THOMAS T. MARTIN, MRS. HELEN SHORES LEE, individually, and in their capacities as members of the ALABAMA EDUCATIONAL TELEVISION COMMISSION; EDWARD WEGENER, individually, and as General Manager of the COMMISSION, Defendants.	)	CIVIL ACTION NO. CV 80-G-0607-S

MEMORANDUM OPINION

This case arose out of a decision by the defendant Alabama Educational Television Commission (hereinafter "AETC") not to broadcast the program "Death of a Princess" in Alabama on May 12, 1980, at 8:00 P.M. "Death of a Princess" was

one of thirteen programs which made up the program series "World." The production of "World" was financed by 144 public television licensees, including AETC, through the Station Program Cooperative (hereinafter "SPC"). The SPC is a cooperative program funding acquisition mechanism which permits the individual licensees of the Public Broadcasting Service (hereinafter "PBS") to participate in the selection and funding of national public television programs. The SPC is managed and operated by PBS.

The program here in issue, "Death of a Princess," was produced jointly by WGBH Educational Foundation, licensee of noncommercial educational television station WGBH-TV, Boston, Massachusetts (hereinafter "WGBH"), and ATV Network of London, England. The program is a docudrama, using actors, concerning the investigation by the director, producer and

co-author into the motivations and circumstances which led to the July 1977 execution for adultery of a Saudi Arabian princess and her commoner lover.

The plaintiffs are residents of the state of Alabama who planned to watch "Death of a Princess." The plaintiffs Muir and Buttram reside in Tuscaloosa, and plaintiff Faircloth resides in Birmingham. The plaintiffs brought this action for injunctive relief under the first and fourteenth amendments to the Constitution of the United States and 42 U.S.C. § 1983. Jurisdiction is vested in this court by 28 U.S.C. § 1343 without regard to the amount in controversy.

Defendant Alabama Educational Television Commission is a body organized under § 16-7-1, Code of Alabama 1975, and vested with the authority and duty to control and supervise the operations of the Alabama Educational Television Net-

work in the state of Alabama. The AETC is charged with the duty of "making the benefits of educational television available to and promoting its use by inhabitants of Alabama." § 16-7-5, Code of Alabama 1975.

The AETC holds a broadcasting license from the Federal Communications Commission ("FCC") and is responsible under its license to select the programming material to be broadcast over educational television. The AETC receives state funds from the special educational trust fund, matching federal funds through the Corporation for Public Broadcasting, and nongovernmental donations.

The AETC is a member of the Public Broadcasting Service, a nonprofit corporation which is responsible for the distribution of public television programs to its members around the country through subscription agreements. Under

its agreement with PBS, each licensee member retains the absolute right to decide what programs distributed by PBS it will broadcast and the times when such programs will be shown. Any licensee may reject and not broadcast any program distributed by PBS.

PBS has appeared as amicus curiae and has filed a memorandum as amicus curiae and has presented oral argument in support of defendants at the preliminary injunction hearing.

Defendants Jacob Walker, Mrs. Jerri McLain, Mrs. Bertha S. Roberts, Thomas T. Martin, and Mrs. Helen Shores Lee are the five commissioners of AETC. Defendant Edward Wegener is the general manager of the AETC.

During the week prior to the scheduled broadcast of "Death of a Princess" on May 12, 1980, the AETC received numerous communications from Alabama residents

in different areas of the state protesting the showing of the program. As a result of those protests and other information AETC had received, the five members of the AETC met by conference call on May 9, 1980, and decided unanimously not to broadcast the program on May 12, 1980. The decision not to broadcast by the AETC was the concern of the AETC that the showing of "Death of a Princess" could expose Alabama citizens in the Middle East to physical and emotional abuse through rioting, physical assault and property damage.

Following the announcement of the AETC's decision not to broadcast this PBS program, the named plaintiffs filed this action on May 12, 1980, seeking a temporary restraining order to compel the AETC to broadcast the film on the night of May 12, 1980. The motion was denied and a hearing was held on June 6, 1980, on plaintiff's motion for preliminary

injunctive relief. At the same time the court heard defendants' motion for summary judgment.

In their complaint, as amended, the plaintiffs seek a manadatory injunction requiring a showing of the film. The complaint also prays for declaratory and injunctive relief that the AETC may not make programming decisions on the basis of "political considerations." The defendants have filed a motion to dismiss the complaint, or, in the alternative, for summary judgment.

The plaintiffs seek to compel the broadcast of the program, "Death of a Princess," by the AETC. This calls into question the authority of AETC to make editorial decisions as to what programs to broadcast and when to broadcast them.

The medium of television is one of scarcity or at least of limited capacity. This is in contrast to other media such

as newspapers which may expand or contract to fit the need of disseminating news, viewpoints, etc. Because of the limitation of the radio spectrum and other reasons, Congress entrusted to the Federal Communications Commission the comprehensive regulation of the television broadcasting industry. Communications Act of 1934, as amended, 47 U.S.C. § 301, et seq., and the Public Telecommunications Financing Act of 1978, 47 U.S.C. §§ 390-99.

AETC authority to make programming decisions is derived from the Federal Communications Act of 1934, which vests responsibility of all programming decisions in the local licensee. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973), (hereinafter referred to as CBS v. DNC); National Broadcasting Company v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed.

1344 (1940). The FCC licenses broadcasters to serve the public interest as public trustees. In that role, they are required to provide programming which is responsive to the needs, problems and interests of the residents of the area they serve and to insure that the public's right to receive suitable access to social, political, aesthetic and other ideas and experiences is realized. However, in fulfilling that requirement, it is the licensee which has both the absolute right and undelegable responsibility to select the programs to be broadcast. CBS v. DNC, supra, at 412 U.S. 94, 103-113, 121-125 (1973). The FCC requires, as a condition to retaining its license, that each broadcaster consistently maintain independent control over the selection of programs broadcast over its channels. See, Cosmopolitan Broadcasting, 59 F.C.C.2d 558 (1976), recon. den. 61 F.C.C. 2d 257;

Alabama Educational Television Commission, 50 F.C.C. 2d 461, 464 (1975); United States Broadcasting Corp., 2 F.C.C. 208, 228 (1935).

The requirement that the local licensee maintain independent control over the selection of programs it broadcasts, necessarily includes the local licenseee selecting and rejecting those programs it broadcasts. This is further reflected in the Federal Communications Commission Regulation, 47 C.F.R. § 73.658(e) (1979), which requires each licensee to reserve the right to reject any programs offered to it for broadcast:

> No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest.

Further, the responsibility of broadcasters to make programming decisions is emphasized in the legislative history of the Public Broadcasting Act of 1967. In S.Rep. No. 222, 90th Cong., 1st Sess. 7 (1967) it is stated that the "local stations are the bedrock" and they rather than anyone else, are to "retain the responsibility to assess community needs and determine what programs will best meet those needs." Thus, Congress clearly provided that "the decision to broadcast . . . [any] program remains with the local station." Id. at 15, and "each station would be required to make its own decision as to what programs it accepts and broadcasts and at what time." Id. at 14-15. It is clearly the intent of Congress and the FCC that each local broadcaster is required to make the programming decisions as to what programs to broadcast and when to broad-

cast them. In addition, the Federal Communications Commission, in its demand for unfettered licensee control over programming has made no distinction between private and public licensees. City of New York Municipal Broadcasting System, 56 F.C.C. 2d 169 (1975).

It is clear that the AETC can and is required to select those programs it broadcasts. The AETC could choose to or not to broadcast the series "World" in exercising its authority over programming. In like manner, the AETC having chosen to broadcast the series "World" could choose to broadcast certain programs of this series and not to broadcast other programs in this series, including the program of "Death of a Princess."

It is clear that the AETC had the authority to and the right to make the programming decision whether or not to

broadcast the program the "Death of a Princess." The question placed before the court is in making that decision not to broadcast "Death of a Princess" did the AETC violate the constitutional rights of the plaintiffs guaranteed under the first and fourteenth amendments?

Evidence presented to this court shows that the decision not to broadcast "Death of a Princess" was made because of the AETC's concern that the showing of this program could expose those Alabama citizens in the Middle East to physical and emotional abuse through rioting, physical assault and property damage. The plaintiffs assert that this decision was one made out of political considerations and thus violates the first and fourteenth amendments.

The first amendment does protect the right to "receive information and ideas." Kleindeinst v. Mundel, 408 U.S.

753, 762-763, 92 S.Ct. 2576, 33 L.Ed. 2d 683 (1972). But "[f]reedom of speech presupposes a willing speaker." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756, 98 S.Ct. 817, 48 L.Ed. 2d 346 (1976). There is nothing in the right to receive information which constitutionally compels others to speak, since the first amendment also protects coextensively "the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L. Ed. 2d 752 (1977). Indeed, this is true even if the unwilling "speaker" is an instrumentality of the government. See, Houchins v. KQED, Inc., 438 U.S. 1, 12-15, 98 S. Ct. 2588, 57 L.Ed.2d 553 (1978)(plurality opinion). Therefore, there is no constitutional basis on which plaintiffs can claim a right to view this program.

Thus, plaintiffs' claim is actually dependent on a demonstration that AETC was somehow required to broadcast the program. The argument that AETC is required to broadcast "Death of a Princess" is fallacious on two grounds: first, the first amendment protects the rights of broadcasters, subject to the Fairness Doctrine,[1/] to make their own editorial programming decisions free of interference; second, there is no first amendment right of access to broadcast stations.

1/ Succinctly stated, the Fairness Doctrine, codified in part at 47 U.S.C. § 15(a) imposes upon the broadcaster the affirmative duties to afford adequate coverage to public issues and to provide that such coverage fairly reflects opposing viewpoints. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 377, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); See, Accuracy in Media, Inc. v. F.C.C., 521 F.2d 288 (D.C. Cir. 1975). Plaintiffs have raised no claims under the Fairness Doctrine.

In applying the first amendment to protect the right of broadcasters to make editorial programming decisions free of interference, the Supreme Court has decided that it is the right of the licensee to decide what material to broadcast. CBS v. DNC, supra. The Court in CBS states:

> More profoundly, it would be anomalous for us to hold, in the name of promoting constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government . . . . Every licensee is already held accountable for the totality of its performance of public interest obligations.

412 U.S. at 121.

The first amendment right of a broadcaster to make programming decisions

clearly extends to noncommercial public licensees, such as the AETC. See, Community-Service Broadcasting v. F.C.C., 593 F.2d 1102 (D.C. Cir. 1978). This principle has been further applied in Writers Guild of America, West, Inc. v. F.C.C., 423 F. Supp. 1064 (C. D. Cal. 1976), where the court held that the licensee's adoption of a family viewing policy was a valid exercise of its constitutionally protected editorial discretion. That court went on to say: "Nor is it the province of the court or the commission to second guess good faith judgments in applying such a policy." 423 F. Supp. at 1134.

The Fifth Circuit Court of Appeals in Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), refused to compel the editor of the student newspaper at a state university to publish an advertisement submitted by a group of

homosexuals on the grounds that "[t]he First Amendment interdicts judicial interference with editorial discretion." Id. at 1075.

Further, this court cannot find a constitutionally protected right of plaintiff to access to the AETC. The Supreme Court in CBS v. DNC, supra, noted that a right to access would cause:

> erosion of the journalistic discretion of broadcasters, . . . and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. The public interest would no longer be "paramount" but, rather, subordinate to private whim . . . .

412 U.S. at 124.

In addition, the Court was concerned that the right to demand that particular programs be broadcast would necessarily result in government intrusion into sensitive first amendment areas:

> Under a constitutionally-commanded and government supervised right-of-access system . . . the [FCC] would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

CBS v. DNC, supra, 412 U.S. at 126-127.

Nor may a public right of access to broadcast stations be found in the Communications Act. In FCC v. Midwest Video Corp., 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979), the Court reaffirmed that Congress has made: "a substantive determination not to abrogate a broadcaster's journalistic independence for the purpose of, and as a result of, furnishing members of the public with media access . . . . " Id. at 705, n. 15.

The Court emphasized:

> The language of § 3(h) [of the Communications Act] is unequivocal; it stipulates that broadcasters shall not be treated as common carriers . . . [Section] 3(h), consistent with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common carrier obligations on broadcast systems. The provision's background manifests a congressional belief that the intrusion worked by such regulation of the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access.

Id. at 705 (footnote omitted).

It is the broadcaster and the broadcaster alone who determines how its facilities are to be used and which programs are to be broadcast. The fact that aETC is an instrumentality of the State of Alabama does not alter that result. See, CBS v. DNC, supra; Mark v. F.C.C., 468 F.2d 266 (1st Cir. 1972); City of New York Municipal Broadcasting System, 56 F.C.C. 2d 169 (1975); Mississippi

Authority for Educational Television, 71 F.C.C. 2d 1296 (1979). These holdings are entirely consistent with traditional first amendment learning. For while that amendment restricts the manner in which the government may regulate speech, it is also clear that it does not preclude the government from speaking, P.A.M. News Corp. v. Butz, 514 F.2d 272 (D.C. Cir. 1975) or from exercising editorial control over its own medium of expression. Mississippi Gay Alliance v. Goudelock, supra.

It is only where the government has created a public forum that a right of access vests. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L.Ed. 2d 448 (1975); Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). It is clear, however,

that broadcast stations are not public forums. Under both the Communications Act and the Public Broadcasting Act, individual licensees must retain and exercise editorial control over their facilities. It is the licensee which must determine the needs and interests to be served and the programs through which those needs must be met. Indeed, the F.C.C. has twice held that state-operated broadcast stations are not public forums. City of New York Municipal Broadcasting System, supra; Mississippi Authority for Educational Television, supra.

Nor can the plaintiffs claim that the decision of the AETC was made in violation of the due process clause of the fourteenth amendment. The plaintiffs allege that since there are no guidelines for determining how the AETC determines whether or not to broadcast a program, that the decision not to broadcast

"Death of a Princess" was a violation of due process. This argument ignores the fact that the decision was made by the members of AETC, who are vested by the legislature of the State of Alabama with the authority and duty to control and supervise the operations of the Alabama Educational Television Network in the state of Alabama. § 16-7-1, Code of Alabama 1975. The AETC alone exercised this authority and the decision was not delegated to subordinates. The unfettered exercise of editorial discretion is vested in the AETC, as required by the FCC in order to retain its license. A good faith exercise of this authority by the AETC is not in violation of the due process clause.

In determining whether or not a program can be compelled to be broadcast the court recognizes that "[i]t is the right of the viewers and listeners, not

the right of the broadcasters, which is paramount." (Citation omitted.) CBS v. DNC, supra, 412 U.S. at 102. And it is "[o]nly when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will governmental power be asserted within the framework of the Act." Id. at 110. The relief the plaintiffs request, that the AETC be compelled to show the program, can only enter the court into the quagmire of trying to oversee on a case-by-case basis the daily operations of the AETC.

To compel the broadcast of "Death of a Princess" would be totally at odds with the purpose of the first amendment. The relief here requested is no different than if plaintiffs had asked this court to enjoin the broadcast of a program which they found objectionable. The doctrine of "prior restraints" is wholly in-

consistent with our cherished concepts of free speech. It would be abhorrent for this court to adopt a doctrine of prior compulsion.

The decisions as to which programs to broadcast and which not to broadcast will seem to some viewers to serve the public "interest;" to others, these same decisions may seem "political." Because each viewer's perspective may differ, courts could be required to determine whether "political" considerations were present when some programs were aired and others were not. This court cannot see where it would serve the public interest to compel the broadcast of "Death of a Princess." If it did so, the court could be called on to determine that AETC must run the NBC nightly news instead of the ABC evening news at 10:30 P.M., or to run "I Love Lucy" instead of the MacNeil-Lehrer Report because a viewer

felt the decisionon what to run was "political." To allow such a taking of the editorial judgment of programming decisions of the licensee and allowing programming decisions to be made by private individuals through the courts, would subject the broadcast media to "private whim" instead of sound editorial discretion in making programming decisions. The public interest is best served when programming decisions are left to the licensees. Indeed, even assuming that AETC's decision here was, by any standard, "political," the evils of judicial supervision of programming judgments present a far greater threat than the presence or absence of a misguided programming choice. As the Supreme Court emphasized in CBS v. DNC, supra,

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors--newspaper and broadcast--can and

> do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility--and civility--on the part of those who exercise the guaranteed freedoms of expression.

412 U.S. at 124-125.

Although the editorial discretion of broadcasters to select programming may not be reviewed here, plaintiffs are not without a forum to have their grievances considered. The F.C.C. regularly reviews the programming judgments of its licensees to ascertain whether broadcasters are complying with the requirements of the Communications Act. The Act provides for public participation in this process, and establishes the procedural mechanisms to hold broadcasters fully accountable

for their programming judgments. Thus, while the F.C.C. may not reverse or compel programming judgments, it can and does review those judgments in the context of station licensing and interpretation and enforcement of the Communications Act.

In order to secure a preliminary injunction, the movant must establish (1) that he or she will be irreparably harmed if the relief is not granted, and (2) that the opposing party will not suffer irreparable injury if the preliminary injunction is granted, (3) a strong likelihood that the movant will prevail on the merits, and (4) that the public interest will be subserved by such relief. E.g., Allison v. Froehlke, 470 F.2d 1123 (5th Cir. 1972); C. Wright & A. Miller, 11 Federal Practice and Procedure, § 2948. See, Congress of Racial Equality v. Douglas, 318 F.2d 95 (5th

Cir. 1962), cert. denied 375 U.S. 829 (1963). The plaintiffs have made no showing of likelihood of success on the merits as discussed above. Further, it is the opinion of this court that it would be adverse to the public interest to intrude into the AETC editorial discretion through a mandatory injunction that the program be shown. It is, therefore, the opinion of this court, for the reasons discussed above, that the plaintiffs' request for preliminary injunction should be denied.

Likewise, it is the opinion of the court that there are no material issues of fact in dispute and that the defendants' motion for summary judgment is well taken and the same should be granted.

A separate order in conformity herewith will be entered by this court.

DONE this the 3rd day of July 1980.

/s/
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7546

D.C. Docket No. C-80-607A

DONALD E. MUIR, H. JEFF BUTTRAM,
and O. NAVARRO FAIRCLOTH,

Plaintiffs-Appellants,

versus

ALABAMA EDUCATIONAL TELEVISION
COMMISSION; JACOB WALKER, ETC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District
Court for the Northern District
of Alabama

Before MARKEY**, Chief Judge, HILL and

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452--October 14, 1980.

**Chief Judge of the U.S. Court of Customs and Patent Appeals, sitting by designation.

ISSUED AS MANDATE: DEC 07 1982

THOMAS A. CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, affirmed.

It is further ordered that plaintiffs-appellants pay the costs on appeal to be taxed by the Clerk of this Court.

September 21, 1981

Thomas A. Clark, Circuit Judge, dissenting.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-7546

D.C. Docket No. C80-607A

DONALD E. MUIR, H. JEFF BUTTRAM,
and O. NAVARRO FAIRCLOTH,

Plaintiffs-Appellants,

versus

ALABAMA EDUCATIONAL TELEVISION
COMMISSION; JACOB WALKER, ETC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of
Alabama

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No. 81-2011

D.C. Docket No. 80-01048

GERTRUDE BARNSTONE and
HARVEY MALYN,

Plaintiffs-Appellees,

versus

THE UNIVERSITY OF HOUSTON,
KUHT-TV, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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Before BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA**, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges.***

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc and was argued by counsel:

ON CONSIDERATION WHEREOF, it is

now here ordered and adjudged by this Court that the judgment of the District Court for the Northern District of Alabama in this cause be, and the same is hereby AFFIRMED; and that the judgment of the District Court for the Southern District of Texas is REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal in No. 80-7546 to be taxed by the Clerk of this Court and that plaintiffs-appellees pay to defendants-appellants, the costs on appeal in No. 81-2011 to be taxed by the Clerk of this Court.

October 15, 1982

RUBIN, Circuit Judge, with whom POLITZ, RANDALL and WILLIAMS, Circuit Judges, join, concurring.

KRAVITCH, Circuit Judge, dissenting.

JOHNSON, Circuit Judge, with whom HATCHETT, ANDERSON, TATE and CLARK, Circuit Judges, join, dissenting.

REAVLEY, Circuit Judge, dissenting.

GARWOOD, Circuit Judge, dissenting.

*Former Fifth Circuit Case, Section 9(1) of Public Law 96-452-October 14, 1980.

**Judge Garza participated in the hearing but took senior status on July 7, 1982 and is no longer qualified to participate in the en banc decision.

Judges Jolly and Higginbotham joined the Court after submission and oral argument but do not choose to participate.

***John C. Godbold, Chief Judge, did not participate in the consideration or decision of this case.

ISSUED AS MANDATE: DEC 07 1982